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PRACTICE REPORTS
IN THE
S U P R E M E C O U R T
AND
COURT OF APPEALS.
OF THE
STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,
(COUNSELLOR-AT-LAW, NEW-YORK.)

VOLUME XXXI.

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PRACTICE REPORTS.

SUPREME COURT.

**JULIA A. WYMAN, respondent agt. WM. H. SMEAD and others,
appellants.**

It is a familiar and well settled rule of law that the assignment of the principal instrument carries with it all *collaterals* as incidents, *though not named*.

And where a mortgage is assigned and taken as collateral security to a contract to convey real estate, and the contract is assigned, the mortgage in fact belongs to the assignee of the contract, though not named in the assignment.

Where such mortgage is assigned to subsequent assignees, neither the first nor last assignee can maintain an action to foreclose the mortgage where there has been no breach of the contract. The subsequent assignee of the mortgage, though a purchaser *bona fide*, and for a valuable consideration, stands in no better position than the first, although the assignments are absolute on their face, and express a full consideration.

The assignee of a mortgage must ascertain at his peril as to any defenses that may exist against the mortgage, or he must rely upon the covenants of his vendor.

Albany General Term, December, 1863.

Before HOGEBOM, PECKHAM and MILLER, Justices.

THIS is an appeal from a judgment entered on the decision of a justice of this court at the Albany circuit, held in March, 1863. The action was for the foreclosure of a mortgage by the plaintiff as assignee. It appeared by the evidence that this mortgage had been taken by John D. Livingston as collateral security for the fulfillment of a contract by defendants Smead and Alexander, for the purchase of some real estate. It also appeared that there had been no breach in the contract up to the time of the commencement of this action; that Livingston had assigned all his interest in the contract before the commencement of this action to Gidney, a defendant herein. The justice held that the plaintiff was entitled on these facts to a judgment of foreclosure,

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and a decree was entered accordingly. From that judgment the defendants appeal.

H. SMITH, *for plaintiff and respondent.*

J. E. VAN ETTEN, *for defendants and appellants.*

By the court, PECKHAM, J. The plaintiff claims to be an assignee or purchaser in good faith, without notice of any of the equities between the original parties. I have great doubt whether the evidence establishes that position. Livingston assigned to one Dorman first, Dorman to Fryer, and Fryer to the plaintiff. Each assignment purporting to be for the consideration of one thousand dollars, the face of the mortgage. There was a covenant in each that that amount was due. There was no proof other than the assignment, that anything was ever paid or advanced on the mortgage by either assignee.

But in the view I take of the case, it is not important whether the evidence establishes such advance. Assuming that it did, and that the plaintiff is thus made a bona fide purchaser of the mortgage; that is, that she had advanced the money upon it, not merely taken a formal assignment; an assignment sufficient on its face to establish a sale, and a sufficient consideration for a sale, as a security or contingent payment of an old debt, not necessarily the advance of the money or its equivalent, and the burden of making that proof rests on the party claiming its benefit, still I think the plaintiff cannot maintain this action.

The cases of *Platt agt. Adams* (7 Paige, 615), and *Nelson agt. Corning* (6 Hill, 336), have no application to this case. They apply solely to the holder of negotiable paper; the rules as to such paper, from principles of public policy, are peculiar. Such principles have no application to a mortgage. But assuming the plaintiff to be a bona fide purchaser, so far as that term may apply to the assignee of a mortgage, I do not think she can maintain this action. The action could not be maintained, it seems to be conceded by Livingston, the primary holder. (He is virtually the first holder under

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the proof. The mortgage was executed originally to another, but taken up and assigned to Livingston, though as assignee.) The contract for the security of which the mortgage had been given to him, was entirely fulfilled on the part of the mortgagors ; at least there was no breach on their part, and the assignee of a mortgage occupies no better position than the mortgagee, or than an assignee of the mortgagee. The case of *Bush agt. Lathrop* (22 N. Y. R. 535), I think is directly in point. I think it entirely meets this case. The assignee of a mortgage must ascertain at his peril as to any defenses that may exist against the mortgage, or he must rely upon the covenant of his vendor. This mortgage in fact belongs to Gidney, the assignee of the contract from Livingston. It is a familiar rule of law that the assignment of the principal carries with it all collaterals as incidents though not named. The following are some of the very numerous cases on this subject: *Langdon agt. Buel*, (9 Wend. 80;) *Jackson agt. Blodgett* (5 Cow. 202); *Parmalee agt. Dann* (23 Barb. 461); *Pattison agt. Hall* (9 Cow. 747).

It is not claimed in the points for the plaintiff, nor on the argument at the bar, that Livingston could have maintained this action on the facts disclosed. It is stated in the points that "there is nothing in this case to show but what under Livingston's agreement, or otherwise, he had become the absolute owner of the mortgage." The evidence is directly the reverse of this proposition. No other agreement or arrangement is shown than the one before stated. If Livingston could not maintain an action, no assignee of his could obtain any better right.

The judgment should be reversed, and a new trial ordered.

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SUPREME COURT.

ADAM GOOD, respondent agt. WALTER L. CURTISS AND FREDERICK DEMING, appellants.

Where there is no note or memorandum in writing made of the contract of sale of personal property for over \$50, nor no part of the purchase money paid, the validity of the agreement must depend upon whether the buyer *accepted or received* any part of the property agreed to be sold.

In order to constitute an acceptance or receiving of a part of the property within the meaning of the statute, it is necessary that there should be some *act*, something done indicating it beyond words merely. Accordingly, where the vendor and vendee, with the property before them, agree upon the terms of sale and the price to be paid, and that the goods which is the subject of the contract shall become the property of the vendee, the title does not pass.

But it is not necessary that any part of the goods should be accepted or received by the buyer at the time of the contract; an acceptance or receiving of the same at any time afterwards, if it be done under the contract, and *while that remains unrevoked*, will be sufficient to comply with the requirements of the statute.

Where in an action upon an account against the defendants, they undertook to set off the value of some personal property which they claimed they had sold to the plaintiff, and that he had accepted a portion of it, which was in his possession, and ratified the agreement by its sale to a third person:

Held, that this action, having been commenced by the plaintiff some three weeks before he sold the property to such third person, was an unmistakable indication of the plaintiff's intention to disaffirm the contract, alleged by the defendants for the sale of the whole property previously, especially as the value of the property claimed by the defendants, largely exceeded the plaintiff's account. Besides the positive testimony was sufficient to show that the alleged contract was discarded by the plaintiff, even though the sale of a portion of the property by the plaintiff, subsequently, might be considered a wrongful conversion of it by him.

Argued at Erie General Term, 8th Judicial District, February, 1866, and decided May General Term, 1866.

Before GROVER, P. J., DANIELS, MARVIN and DAVIS, J. J.

THIS action was brought to recover the price of certain work and labor performed, and materials furnished, by the plaintiff for the defendants, at their request. The defendants defense consisted of an account for iron, and other things, alleged to have been sold and delivered to the plaintiff at his request, and which they endeavored to set off against his demand on the trial of this action. This was rejected by the referee before whom the trial was had, and

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various exceptions were taken to his rulings by the defendants.

The evidence, on the part of the defendants, proved that about the middle of September, 1864, the defendants owned a quantity of old iron and copper, part of it being at their store and part of it at the plaintiff's shop, and the residue near Mr. Noye's foundry, in the city of Buffalo; and at that time the agent or superintendent of the plaintiff's business, offered to buy the iron and copper of the defendants at certain prices per pound, then specified by him, which the defendants agreed to answer on the following day, and on that day informed the plaintiff's clerk, at his place of business, that they would sell the plaintiff the iron and copper at the prices offered for the same.

By the terms of the offer, which was accepted by the defendants, the plaintiff was to have the iron weighed, and remove that part of it to his shop which was not then there. That part of the iron was not weighed by the plaintiff, or by any person acting under his authority, and no part of it was removed from the place where it was when the offer was made, or taken to the plaintiff's shop. The iron at the shop remained there until the first of December, 1864, when the plaintiff sold it to persons to whom he had previously sold out his business and shop. At the time of the sale of this part of the iron, the plaintiff stated to the purchaser of it, that he had bought it of the defendants, and credited it to them on their bill.

At the time when the offer was made for the purchase of the iron and copper from the defendants, the plaintiff was absent from the city of Buffalo, and had no personal knowledge of what had transpired in relation to it until the early part of November, 1864.

The plaintiff's son, who was his clerk, testified that he told Mr. Curtiss that he didn't want the iron; which, he says, took place about two weeks after a conversation between Deming and Allen, the plaintiff's superintendent, in which something was said about seeing Dunbar, &c. The superintendent, Mr. Allen, testified that the clerk did tell Mr. Cur-

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tiss that he did not want the iron the latter part of October, 1864, about the time the bill of the plaintiff's demand was made out. The defendant, Deming, testified that the Clerk did not tell him that he did not want the iron, and that he never had any conversation at the plaintiff's office, when Dunbar's name was mentioned, as the clerk had testified. The clerk testifies that he never told Mr. Deming anything about the iron; and Curtiss does not appear to have been examined as a witness on the trial.

At the price offered for the iron and copper, it amounted to the sum of \$391.19. No part of this price was, at any time, paid, or credited by the plaintiff, or any one acting for him, to the defendants.

The referee found that the contract of sale was entered into, as the defendants claimed it to be, but that no part of the iron or copper was ever weighed by or delivered to, or received or accepted by the plaintiff; and that the contract, not being in writing, was void. To these conclusions the defendants excepted; and from the judgment entered upon the referee's report, which was in favor of the plaintiff for the amount of his account, the defendants appealed.

GEO. WADSWORTH, *for appellants.*

MANN and COTHRAN, and GEO. W. COTHRAN, *for respondents.*

I. The agreement for the sale of the old iron and copper never having been completed, was void. (2 N. Y. S. at L. 140, § 3.)

1. No part of the iron or copper was ever delivered.
2. The agreement was not in writing; and nothing has been paid on it.
3. No part of the iron or copper was ever weighed until after this action was instituted.
4. The iron and copper were to be weighed in order to ascertain the quantities of each.
5. When weighed by defendants, after this action was

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brought, it remained in same place and condition as when the pretended agreement was made.

6. The whole transaction amounted to just this: Allen, the plaintiff's agent, made defendants an offer for the old iron and copper, part of which was in plaintiff's yard, as mere bailee, and part at defendants' store, which offer defendants were to accept, and notify Allen of their acceptance that evening or the next day, and the defendants did not inform him of their acceptance of the offer.

Deming testifies that he informed A. Good, Jr., that they could have the iron and copper without alluding to Allen's offer, and there is no evidence that young Good knew of the offer Allen had made. But A. Good, Jr., testifies to the contrary, as to notice. And the referee has found that the "negotiations" never became a valid contract, which in legal effect is a decision that no notice was given.

Even were it true that the notice had been given to A. Good, Jr., as Dening testifies, it was no notice to Allen or to plaintiff, for Good, Jr. had no authority to purchase. Furthermore, A. Good, Jr., never informed Allen or plaintiff.

This agreement was talked about *during the creation* of plaintiff's account.

Deming testifies that the plaintiff's account was to be applied in part payment for the iron and copper. But no application of it was ever made by either party, nor in any manner. Neither party performed any *act* in that behalf (*Ely agt. Ormsby, 12 Barb. 570*).

When defendants subsequently spoke to Allen about the iron and copper, Allen declined to take them.

The first information plaintiff had on the subject was when he presented this account for payment. This was about November 1st. That he refused to assent to the pretended sale, is shown by his bringing this action November 9.

Nothing can be claimed on account of the iron sold by plaintiff to Farrar, Trefts & Knight. That was sold December 1st, after this suit was brought. Having refused to complete the purchase, and having brought this action in disaffirmance thereof, the subsequent sale by plaintiff of part

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of defendants' property without their knowledge or consent, amounted to a wrongful taking and conversion. There is no pretense that plaintiff intended to apply the iron thus used, on the contract which he had already so distinctly disaffirmed.

An acceptance to be binding must be clear and unequivocal. (*Ely agt. Ormsby*, 12 Barb. 570; *Carter agt. Touissant*, 5 Barn. & Ald. 855).

II. To render a void contract valid by reason of a subsequent part payment, or partial delivery of the property, the part payment or partial delivery must be made by the one party, and accepted and received by the other party, with the mutual agreement and intent that it is to be applied upon, and to be a part performance of the contract. (*McKnight agt. Dunlop*, 1 Seld. 543-4; *Marsh agt. Hyde*, 3 Gray, Mass. R. 331; *Browne on Statute of Frauds*, §§ 337, 339, p. 346; 2 *Abbts. Digest* 88, Nos. 770-2, and cases cited; *Shindler agt. Houston*, 1 N. Y. R. 265.)

In this case there was neither a delivery nor part payment. The whole transaction consisted merely of words. Something more than words is essential. (*Shindler agt. Houston*, 1 N. Y. R. 261, 265; *Brabin agt. Hyde*, 32 N. Y. R. 519.)

There was, therefore, no contract made.

Even had Deming notified Allen of defendants acceptance of his offer in time, it would not avail ought to the defendants.

This account was not created with reference to the sale of this iron and copper. Plaintiff had been performing similar services and furnishing similar materials prior to this, and this account was commenced in July, and this offer was made the middle of September, and it was not credited by the parties on the alleged contract, nor intended to be credited unless plaintiff took the iron and copper.

Even had the parties mutually agreed that this account should apply on the iron and copper, yet not having been actually applied, it would not take the case out of the statute. (*Clark agt. Tucker*, 2 Sandf. 157; *Ely agt. Ormsby*, 12 Barb. 570.)

There are cases where a party has been held to have

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affirmed a void contract for the purchase of personal property, by subsequently dealing with the property as his own. But in all those cases, the interference with the property was antecedent to his positive refusal to be bound by the contract. Such was the case of *Chaplin agt. Rogers* (1 *East*, 192), where the purchaser actually sold part of the hay, and which had been removed by the party to whom he sold it. The jury found that there had been an acceptance, and the verdict was allowed to stand. (See *Shindler agt. Houston*, 1 *N. Y. R.* 268, bottom of page.)

III. Where anything remains to be done by the vendor, such as ascertaining the identity, quantity or quality of the articles sold, the title does not pass. (*Joyce agt. Adams*, 4 *Seld. R.* 291; *Outwater agt. Dodge*, 7 *Cow.* 85.)

There was no delivery, nor was the iron or copper weighed until plaintiff refused to have anything to do with the contract.

Suppose an execution had issued against defendants at any time, could there be a doubt but what this property would have been liable to levy and sale?

Part of this iron had been in plaintiff's yard long anterior to Allen's offer. The balance of the iron and the copper were in defendants' store on Main street, where it still remains.

IV. The defendants allege in their answer, that they have paid this demand. The referee negatives this averment, except as to \$2.84. This finding is correct.

The other defense consists of this contract for the sale of the copper and iron. The referee has fully disposed of that by finding that no valid contract was made. This finding is also in accordance with the evidence.

From this disposition of the case by the referee, it necessarily follows that whatever iron belonging to defendants that plaintiff may have used, was not used under the contract alleged in the answer, but was converted by plaintiff. There is no allegation in the answer under which the defendants can claim to have the value of this iron set off against plaintiff's demand. And then the recovery here is no defense to

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an action in favor of defendants for the iron thus converted. The judgment should not be disturbed on this account, but should be affirmed.

The whole case resolves itself into two questions of fact. 1st. Was there a contract of sale of this iron and copper made?

2d. If made, was there a part payment or partial delivery of the property as required by the statute? The referee has distinctly negatived both of these questions; and his findings are not only supported by the evidence, but there is really no evidence to the contrary.

By the court, DANIELS, J. If the agreement made between defendants and the plaintiff for the sale and delivery of the iron and copper was binding upon the parties, it was sufficient to constitute a sale of the property, as distinguished from a mere agreement to sell; for nothing further was to be done on the part of the vendee, as between them and the purchaser, and where that is shown to be the case, the title to the property passes to the purchaser, even though it may still be necessary for the vendee to weigh it in order to ascertain the aggregate price he may be liable to pay for it under the agreement. (*Smith's Mercantile Law*, 571-3, and *Notes*; *Downer agt. Thompson*, 6 *Hill*, 208; *Joyce agt. Adams*, 4 *Seld.* 291, 296; *Terry agt. Wheeler*, 25 *N. Y. R.* 524-5.)

The difficulty in the way of carrying the agreement into effect, therefore, arises solely out of the circumstances that there was no note or memorandum of it in writing. The statute commonly called the statute of frauds, provides that every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void unless, 1st. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, 2d. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, 3d. Unless the buyer shall at the time pay some part of the purchase money (3 *R. S.* 5th *ed.* 221, § 83). As no note or memorandum of the contract of sale was made, nor no part of the purchase money paid

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in this case, the validity of the agreement depends entirely upon whether the buyer accepted or received any part of the goods or property which was the subject of the agreement.

In order to constitute an acceptance or receiving of a part of the goods within the meaning of the statute, it is necessary that there should be some act, something done indicating it beyond words merely. Accordingly, it has been held that where the vendor and vendee, with the property before them, agree upon the terms of sale and the price to be paid, and that the subject of the contract shall become the property of the vendee, the title does not pass if the price for which the sale is made exceeds the sum of fifty dollars. (*Shindler agt. Houston*, 1 Comst. R. 261; *Brabin agt. Hyde*, 32 N. Y. R. 519.)

It is not necessary that any part of the goods should be accepted or received by the buyer at the time of the contract, but an acceptance or receiving of the same at any time afterwards, if it be done under the contract, and while that remains unrevoked, will be sufficient to comply with the requirements of the statute. (*Sprague agt. Blake*, 20 Wend. 61; *McKnight agt. Dunlop*, 1 Seld. 537.)

If the contract between these parties continued open at the time when the plaintiff sold the iron upon his premises which belonged to the defendants, to Farrar, Treffts & Knight, that sale of itself will be sufficient to charge him with having received and accepted a part of the property, which by the contract he had undertaken through his agents to purchase; for a more unequivocal act of acceptance than that of selling and transferring the property to another cannot very well be imagined.

The only question necessary for consideration in this case, therefore is, whether the contract of sale between the defendants and the plaintiff was at that time subsisting and unrevoked. If it was, then the acceptance of that part of the iron which was on the plaintiff's premises rendered it valid and binding not only as to that, but as to all the rest which was included in it. If, however, an end had been put to the

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contract, then the sale made of this part of the iron by the plaintiff, would not renew or revive it, although he informed the purchasers that he had bought it of the defendants and credited it to them on their bill. The sale, then, would be a conversion of the property, for which the plaintiff would be liable to defendants to the extent of its value, and not an acceptance of it under the contract of sale; for such an acceptance would be manifestly impossible if the contract had previously been terminated by the act of either or both of the parties.

The referee found and decided that there was no delivery or acceptance of any part of the property, and that the sale made by the plaintiff of that which was upon his premises, was a wrongful conversion of so much of it as he then sold. To justify that conclusion, the evidence must have satisfied him that the contract between the defendants and the plaintiff was not at that time open and subsisting, for upon no other theory could such a conclusion be maintained.

This action seems to have been commenced early in the month of November, in the year 1864, about three weeks before the sale of the iron about his premises was made by the plaintiff to Farrar, Trefts & Knight. The commencement of the action, upon his own account, which would have been overpaid if the contract for the sale of the old iron had not then been repudiated, was an unmistakable indication of the plaintiff's intention to disaffirm that contract. But the evidence of disaffirmance is not wholly confined to that circumstance; for Adam Good, Jr., who was clerk for his father, the plaintiff, in his business, testifies that he told Curtiss, one of the defendants, that he did not want the iron. Mr. Allen, the superintendent, testifies that this was about the latter part of October, 1864. And the other defendant testifies that about a week before the suit was commenced, the plaintiff and Allen, his superintendent, called upon him to settle the bill in suit; that the contract for the sale of the iron was then communicated to the plaintiff, who replied it was the first he had heard of it; and that Allen admitted he had made the offer for the iron, but thought the defend-

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ants had not fulfilled their part of the contract and the thing was thrown up.

When it is remembered that the plaintiff was absent at the time the agreement was made for the sale of the iron and copper, and did not return until about the first of November, and during such absence his business was entirely under the control and management of Allen, and the clerk who notified Curtiss that he did not want the iron, it will be seen that there was an unequivocal disaffirmance of the contract by the same persons through whose agencies it was first made, if the referee believed the evidence they gave, and this he must have done before he could reach the conclusions contained in his report. Indeed, when the evidence of Allen and the clerk is considered, with the interview which Deming had with the plaintiff, it is very difficult to see how he could have concluded otherwise.

After that interview, there was no negotiations for reviving the agreement, and nothing said or done indicating any intention to renew or revive it. The mere sale of a part of the iron, accompanied with a statement which the referee finds to have been made, was not sufficient to produce that result.

It follows, therefore, that none of the property was accepted or received by the plaintiff under the contract of sale, and that by the positive declaration of the statute the contract was void.

The defendants insisted upon the argument that the referee should have allowed them the value of the iron sold by the plaintiff. But as that was not accepted under the contract, the plaintiff was not chargeable for it with the prices which it specified, and the value of it was not otherwise proved. Even if it had been, that value could not be allowed in this action, where the liability arose, as it did in this case, out of a wrongful conversion of the property. If the sale had been made before the suit was commenced, the defendants might have waived the tort, and held the plaintiff liable for the proceeds received by him as money had and received to their use, if it had appeared what such

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proceeds were. But no evidence was given from which the referee could have determined that as matter of fact. Besides that, the demand had no existence at the time of the commencement of the action, which was sufficient to prevent its allowance either as a counter-claim or a set-off. (*Code*, § 150, *sub.* 2; 3 *R. S.* 5th ed. 634-5, § 12, *subd.* 4.)

The judgment appealed from should be affirmed, with costs.

SUPREME COURT.

OSCAR O. FINNEY agt. JACOB VEEDER.

Where the plaintiff recovers judgment in the justices court for \$100, and on appeal to the county court, serves an offer on the defendant to correct it, by taking \$25 less, which offer the defendant does not accept, the defendant cannot prove the offer in the county court for the purpose of substantiating his assertion to the jury, that the offer was evidence that the plaintiff had no confidence in his case.

Whether it was necessary to prove the offer in reference to the question of costs. *Dub.* It seems that the offer might be used on the adjustment of costs, without being proved in the county court.

Albany General Term, September, 1865.

Before HOGBOOM, MILLER and INGALLS, Justices..

THIS is an appeal from a judgment of the county court of Albany county, in favor of the defendant for costs. The action was commenced in the justices' court, where a judgment was rendered in favor of the plaintiff for \$100 damages, besides costs. From that judgment the defendant appealed to the county court, and recovered judgment for costs. After the notice of appeal was served, the plaintiff served upon the defendant the following offer:

Finney agt. Veeder.

"ALBANY COUNTY COURT :

OSCAR O. FINNEY

agt

JACOB VEEDER.

"To WILLETT & HAWLEY, appellant's attorneys :

"Gents : Please to take notice that the respondent offers to let the judgment herein be corrected, by deducting therefrom the sum of twenty-five dollars. July 7th, 1862.

"P. D. NIVER, Respondent's Attorney."

This offer was not accepted by the appellant.

IRA SHAFER, *for appellant.*

LYMAN TREMAIN, *for respondent.*

By the court, INGALLS, J. The only question involved in this appeal, is whether error was committed in allowing the above offer to be given in evidence, under the circumstances, in the manner, and *for the purpose it was introduced.* The only legitimate effect of the offer, under § 371 of the Code, was upon the question of costs, and I do not think it was necessary even to prove it upon the trial to secure the benefit of that provision, as it might have been used upon the adjustment of costs. But assuming that it could properly be proved upon the trial, it does not follow that it was appropriately received upon the trial in the county court.

It appears, from the case, that it was used by the defendant for a purpose wholly unauthorized, and well calculated to prejudice the plaintiff's case. Previous to the introduction of the offer, the counsel for the defendant stated *to the jury that the offer was made because the plaintiff had no confidence in his case.* This statement was objected to by the plaintiff's counsel, on the ground that there had been no proof on the subject, and that if an offer had been made, it could not be proved to the jury. The offer was then given in evidence by the defendant, and read to the jury under the plaintiff's objection.

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properly introduced to apprise the jury of its effect upon the question of costs.

If it be assumed that this position is sound, the difficulty yet remains, as the offer was not used for that purpose, neither the court nor counsel informed the jury of the proper effect of the offer. On the other hand, we must assume from the facts detailed in the case, that an erroneous impression was produced upon the minds of the jury in regard to the object of such offer, which was allowed to remain uncorrected by the court, and probably did influence the jury to the prejudice of the plaintiff. It is said by the defendant's counsel that as the verdict was for the defendant, it is apparent that no injury resulted from the introduction of the offer, as it could only affect the amount of damages in case the plaintiff prevailed in the action.

I do not think that we should thus assume, as it is impossible to calculate how far the jury might have been influenced by the improper use of such evidence. An error can only be disregarded when it affirmatively appears that no possible injury could arise to the party complaining (*Worrall* agt. *Parmelee*, 1 *Comstock*, 519). I am therefore of opinion that the judgment must be reversed, and a new trial had in the county court, with costs to abide the event.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF JAMES W. BEEKMAN
TO HAVE CERTAIN ASSESSMENTS FOR REGULATING AND GRADING
FIRST AVENUE FROM THIRTY-SEVENTH TO NINETY-FIRST
STREETS VACATED.

There is no statute requiring that an *assessment for regulating and grading streets, &c.*, in the city of New York, shall be made only *after the completion of the work*

If the assessment precedes the performance of the work, an *estimate* of the expense must be first made; but after the work has been completed, and the

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expense has been paid or incurred, or definitely ascertained, the estimate is superfluous.

Where all the work has been contracted for, but a portion of it only has been completed when the assessment is made, an *estimate* is necessary in order to ascertain the amount to be assessed.

It is not necessary that the *duties* to be performed by the assessors should be named in the ordinance. The law has prescribed the duty which they are to perform.

Where the *assessors* consisted of three members, two of whom were appointed by original ordinance in 1856, and one by the board of commissioners of taxes under the act of 1859, in place of one of the original assessors who had resigned after the assessment list had been reported to the board of revision; and the board, after such resignation, returned the list to the assessors *for correction*:

Held, that it was a legal irregularity for the *two* original assessors to proceed to correct the assessment, without inviting or requesting the other recently appointed assessor to act with them.

The statutory rule, as well as the rule of the common law, applicable before the act of 1859, which authorizes a majority of the board of assessors to be appointed under that act, to make estimates and assessments, requires all the members to meet and consult, although a majority may decide, unless special provision is otherwise made.

It may be lawful for two to act, if one neglects or is unable to perform duty as an assessor, but it is illegal to exclude one assessor from acting, *intentionally*.

New York General Term, November, 1865.

Before INGRAHAM, P. J., LEONARD and BARNARD, Justices.

THE corporation of New York adopted an ordinance that First Avenue, from Thirty Seventh to Ninety First streets, be regulated and graded. Charles McNeill, Jacob F. Oakley and William A. Dooley were, by the ordinance, appointed assessors "to make a just and equitable assessment of the expense of conforming to this ordinance among the owners and occupants," &c.

The work was divided by the street department into three sections, and to enable the contractor upon one section to get money pending the work, the assessors named in the ordinance proceeded to lay an assessment for the whole work, although the work had not been done, and no estimate for said work had been made by any persons authorized so to do by the common council, or having any authority for that purpose. The assessment so made by them was sent by the assessors to the board of revision and correction of assessments, December 21st, 1863, and was in the hands of that board on the 31st day of December of that year, when

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Charles McNeill, one of the assessors, resigned his office and entered upon his duties as member of assembly, to which office he had been elected. Errors having been found in the assessment, on the 13th day of January, the list was returned to the assessors for correction. The list was received by the remaining two assessors, and by them nearly all the items in the assessment list were increased, including those upon the property of petitioner, McNeill not meeting nor conferring with the assessors.

The assessment was vacated upon the proofs by the justice before whom the proceedings were had, and from his judgment order an appeal is taken on the part of the corporation.

JOHN E. DEVELIN, *counsel to the corporation.*

This is an appeal from a judgment rendered at spécial term, vacating the above assessment as to the property of the petitioner. The objections to the assessment are as follows :

First.—That the work is not completed.

Second.—That only two of the assessors acted in the correction of the list.

Third.—That various unauthorized and excessive items of expense have been included in the assessment.

I. It was not irregular to make the assessment before the completion of the work.

(a) The improvement for which the assessment in question was laid was made in the exercise of the power conferred upon the corporation by the act of 1813.

The same section of the act which authorizes the improvement, also provides for the making of a just and equitable estimate and assessment of the expense thereof among the owners and occupants of the property benefited. (2 R. L. 1813, chap. 86, p. 407, § 175 ; *Valentine's Laws*, p. 1190.)

The language of the act clearly indicates that the assessment is to precede the completion of the work, and such has been the judicial construction placed upon it. (*Elmendorf agt. Mayor*, 25 Wend. 696 ; *Doughty agt. Hope*, 3 Denio, 249.)

This construction is strengthened by the provisions of the

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one hundred and seventy-sixth section of the act of 1813, which in substance declares, that if the sum expended in making the improvement exceeds the amount estimated and collected, a further assessment, equal to the amount of such excess shall be made; and in case the sum expended shall be less than that estimated and collected, the surplus shall be returned to the persons from whom it was collected, or to their legal representatives. (2 *R. L.* 1813, *chap.* 86, § 176; *Valentine's Laws*, p. 1192.)

This construction is also sustained by the language of the act of 1859, creating the board of assessors, and prescribing their duties. (*Laws of 1859*, § 15; *Valentine's Laws*, p. 1280, § 15.)

The act of 1824 still further strengthens the position taken, that the assessment should precede the completion of the work. This act originated in the doubt as to what work could be done at the expense of the corporation under the 270th section of the act of 1813. The act removes the doubt, but in its removal expressly provides that assessments for the expenses incurred are to be made as directed in and by the 175th section of the act of 1813 (*Laws 1824*, *chap.* 49, p. 39).

The fact that the ordinance does not provide for making an *estimate* and assessment of the expense, but only provides for an assessment, is immaterial. The duties of the assessors are prescribed and regulated by statute and not by ordinance. (*Laws 1859*, *chap.* 302, p. 678, § 15; 2 *R. L.* 1813, *chap.* 86, p. 407, § 175.)

Construing the 15th section of the act of 1859, in connection with the 175th section of the act of 1813, and there can be no doubt but that the assessment should precede the completion of the work.

II. The objection that the assessment is void, for the reason that only two of the assessors acted in its reparation and correction, cannot be sustained.

(a) The assessment list was first completed on the 10th day of October, 1863, and was sent to the board of revision on the 21st of December, 1863. On the 13th of January, 1864, the list was returned to the assessors for correction.

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The corrections consisted of the addition of two items of expense amounting to fifteen hundred dollars—five hundred dollars for culverts, and one thousand dollars for surveyors' fees—these two amounts having been inadvertently omitted from the list as prepared October 10, 1863.

After the list was corrected, it was readvertised for objections for the time required by law. On March 4, 1864, the list as corrected was sent to the board of revision for confirmation, and was confirmed by that board on the 15th day of March, 1864.

In making the assessment as completed October 10, 1863, all three of the assessors acted. In the correction of the assessment only two of the assessors, Dooley and Qakley acted, McNeill having resigned on the 31st day of December, 1863.

Upon this state of facts it is insisted that the assessment is void, for the reason that only two of the assessors took part in the correction of the list.

This position is founded upon the rule that when an authority is conferred upon three or more officers, to be exercised for a public purpose, all the persons upon whom the authority is conferred must meet and consult.

This rule, however, has no application to the powers conferred upon the board of assessors as at present constituted (*Laws 1859, chap. 302, p. 683, § 16*).

By this section of the act of 1859, it is expressly provided that a majority of the "assessors shall make all estimates and assessments, give all notices," &c. ; or, in other words, the power relative to assessments, which under the act of 1813, was conferred upon the three assessors jointly, is by the act of 1859, conferred upon a majority.

The reason of the change effected by the act of 1859 is obvious, when it is remembered that under the act of 1813, a similar objection to the one now urged against this assessment was taken and sustained as valid, the act of 1813 not providing that a majority might make an assessment. (*Doughty agt. Hope, 3 Denio, 594 ; Affirmed, 1 Comst. 79.*)

This assessment was corrected in January, 1864, and two

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of the assessors, Oakley and Dooley, acted in its correction, and it is, therefore, a valid assessment under the act of 1859, and the rule that all must meet and consult, is not applicable. Conceding the application of the rule, yet it is not without exception, but is subject to the reasonable modification that when all are notified or have an opportunity to act and decline to do so, yet the act of the majority is valid, and those declining to act are to be regarded as having dissented. (*Horton* agt. *Garrison*, 23 Barb. 176; *People* agt. *Walker*, 23 Barb. 304; *People* agt. *Batchelor*, 28 Barb. 310; *People* agt. *Batchelor*, 22 Barb. 128; *People ex rel. McSpedon* agt. *Supervisors of New York*, 18 How. 152.)

It is clear that McNeill would have had authority to act in the correction of the assessment had he been a member of the board at the time it was returned to the assessors. Jones, as successor of McNeill, was possessed of all the powers which McNeill would have had in case he had not resigned. The proofs show that Jones was cognizant of all the steps taken in the correction of the assessments (*Testimony of Allen, cross-examination*).

An opportunity, therefore, was afforded to the third assessor, to act had he felt so inclined, and the assessment therefore, falls within the exception to the genral rule, and is valid.

III. The charge for assessing was properly included in the assessment.

(a) It is clear that one of the items of expense which must attend every improvement of the character of the one for which this assessment was laid, is the expense of apportioning and assessing its cost. In this case the assessors have, under the solemnity of their oaths, fixed that amount, and in the absence of fraud, their decision is binding and conclusive. (*Miller's Case*, 12 Abb. 121; *Matter of Seventy-ninth street*, INGRAHAM, J.) In the case last cited this same objection was taken, and was overruled by Justice INGRAHAM.

IV. The objections that the charges for advertising and surveying are excessive, and that in correcting the list the assessors did not make a just and equitable apportionment of the

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one thousand five hundred dollars added, are neither sustained by the proofs nor available to the petitioners.

(a) The amount charged for the estimated expenses of advertisement is five hundred dollars. The correctness of this charge is sought to be impeached by the testimony of the witness Allen, who swears that the average expense for advertising assessment lists would be between seventy-five and eighty dollars—certainly less than one hundred dollars. He then swears that the estimate of the expense of advertising this list before it came to the assessors, as certified to by the street commissioner, was one hundred and twenty-three dollars and seventy-five cents, and that the whole expense incurred by the assessors would not exceed seventy-five dollars, making an aggregate of two hundred and eight dollars and seventy-five cents, or more than double the average price, as sworn to by him, clearly showing that the average price furnished no criterion by which to judge of the necessary expense.

He also testifies that his estimate does not include the cost of advertising preliminary to the passage of the original ordinance. The greatest force that can be given to the testimony of this witness is, that in his opinion, the charge for advertising is excessive. The question therefore is, whether his judgment or that of the two assessors, the sworn officers of the law, skilled from long experience in the discharge of the duties of their office, in making estimates of this character, shall prevail.

As to the item of surveying, there is no evidence attacking its correctness. The street commissioner certified to three thousand and one dollars and fourteen cents.

This was for maps ordered by that department. Subsequently the assessors had need of two additional maps which they ordered, and which now form a part of the assessment list, and the cost of which makes up the remaining sum of the charge for surveying. Conceding that the amounts estimated as expenses of assessing, advertising and surveying are excessive, yet that would not make the assessment irregular, but would only convict the assessors of an error of

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judgment, from which the petitioner could not suffer any damage, as the 176th section of the act of 1813, provides for the return of all the excess of the estimates over the real cost to the parties interested.

(b) These objections having never been presented to the assessors prior to the confirmation of the assessment, they are not now available to the petitioners. The act of 1841 furnishes an opportunity to all persons having objections to any assessment to present them to the chairman of the board of assessors, whose duty it is made to transmit them with the assessment to the persons authorized to confirm the same (*Laws 1841, p. 48*).

This provision of the act of 1841, is analogous to that of the act of 1813 (*Davis R. L. p. 537, § 187*), and under that act it has been held that affidavits and objections not presented to the commissioners, could not be read or heard in opposition to a motion to confirm their report. (*Harman street, 16 Johns. 231; Matter of Pearl street, 19 Wend. 649; John and Cherry streets, 19 Wend. 657; William and Anthony streets, 19 Wend. 680; Owners of ground agt. Mayor, 15 Wend. 374, 377; Lyon agt. City of Brooklyn, 28 Barb. 609; Washington Park, Brooklyn, 1 Sandf. 283.*)

The petitioners having failed to present objections to the assessment before its confirmation, are estopped from raising them now for the first time. (*Miller's Case, 12 Abb. 121; Keyser's Case, 10 Abb. 481; Babcock's Case, 23 How. 118; People agt. City of Rochester, 21 Barb. 657; Sandford agt. Mayor, 33 Barb. 147.*)

The objection to the assessment that the assessors in correcting the assessment did not distribute the sum of fifteen hundred dollars equitably, is not sustained by the proofs, nor is it subject to review here.

Allen swore that in correcting the list he acted under the directions of the two assessors, Oakley and Dooley. His opinion, therefore, that the distribution made of the fifteen hundred dollars was made without regard to the location or benefit of the property assessed, ought not to outweigh the sworn statement of the assessors that the assessment is just

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and equitable, especially when this objection is taken for the first time after confirmation. The judgment of confirmation is conclusive upon questions such as this (*Miller's Case, supra*).

Treating the act of confirmation as a judgment of a tribunal of special and limited jurisdiction, as was done by Justice LEONARD in *Miller's Case*, and, therefore, conclusive upon parties and privies when jurisdiction is acquired and no fraud committed, it follows that the objections here taken cannot be sustained.

It would be quite as competent to impeach a judgment of the supreme court at special term, by the testimony of the clerk, that the presiding justice in rendering the judgment did not regard either the evidence in the case nor the principles of law governing it.

V. The application should be dismissed.

HENRY H. ANDERSON, *for respondent*.

PRELIMINARY.—The appeal should be dismissed. The order made by the justice in vacating is final, and not subject to review (*Matter of Dodd*, 27 N. Y. 629).

First.—An assessment cannot be laid before the work assessed for is actually done. The provision of section 175 of the act of 1813, authorizing the appointment of assessors to estimate the expense of a projected improvement, and the subsequent assessment of such estimated expense, was adapted to a different state of things from that existing at present in the city. It was only temporarily used, and the law authorizing such estimate has since been repealed by necessary implication. But it is unnecessary to determine that question in this case, for, even if the power exists, it is necessary to do certain things which have not been done, and to leave undone certain things which have been done.

(a) By section 175 of the act of 1813, (*Davies Laws*, p. 526), power was given to the Common Council to make improvements, and to cause estimates of the expense of conforming to such regulations to be made, and a just and equitable as-

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assessment of such estimated expense to be subsequently made among the owners, &c., of lots. It is further provided that the mayor, aldermen and commonalty, shall appoint three skillful and competent persons to make every such estimate as well as to make the assessment. The action of the common council is as necessary to authorize an estimate as an assessment. The manner of laying an assessment is then designated particularly by section 175. After the money is collected the corporation may proceed to do the work. This provides for one class of cases. A second class is provided for by section 270. By this the mayor, aldermen and commonalty are authorized in all cases *where they may deem it necessary*, for the more speedy execution of the work, to have such work done at their own expense on account of the persons, respectively, upon whom the same may be assessed, &c. They are given authority to do the work and then to levy and collect the amount expended.

By the act of February 16, 1824, (*Davie's Laws* p. 659,) it is provided that assessments for any expense for local improvements, *with interest*, may be made as directed in and by section 175, and shall be a real incumbrance upon the houses and lots, which may be sold for any such assessment thereon, &c.

The provision for interest is noteworthy, showing the intention that the money should have been *expended*.

The mayor, aldermen and commonalty, deemed the work in question one which should be done at their own expense. As this brought the case under section 270, they did not appoint any persons to estimate the expense, nor authorize such estimate to be made, but authorized only an assessment of the expense when the same should actually be incurred. In this case the assessors have acted prematurely. There was no authority for making the assessment which was made. An assessment under such an ordinance as the one under which this work was done, for anything else than *the expense of conforming to the ordinance*, is *ultra vires*. Such expense cannot be ascertained until the work is done.

As the amount assessed is only an estimated amount, de-

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terminated by no lawful authority, there is no pretence of law by which the property of the petitioner can be charged with an assessment therefor.

The assessment made was, on this ground properly vacated.

Second.—But even were an assessment authorized it has not been lawfully made.

1. Three assessors, McNeill, Oakley and Dooley, were appointed by the ordinance to make this assessment. December 21, 1863, the list was sent to the board of revision and correction. December 31, McNeill resigned. January 13, 1864, the board sent the list back to the two assessors, Oakley and Dooley, who increased nearly all the items in the assessment list without conference with the third assessor. This was an irregularity.

(a) The principle is too well settled to be now disturbed that where any three persons (not a court) are appointed to act judicially, upon a public matter, they must all confer, but a majority may decide.

This will be rigidly enforced, especially in such proceedings as tend to divest a man of the title to his property. The act, in authorizing the making of assessments by three assessors, or a majority of them, does not intend to change the rule of law, but is merely giving expression to the law as settled by adjudicated cases. (*Doughty* agt. *Hope*, 1 *Comst.* 82; *Ex parte Rodgers*, 7 *Cow.*, 526; *Lee* agt. *Parry*, 4 *Denio*, 125; *Sharp* agt. *Johnson*, 4 *Hill*, 99; *Powell* agt. *Tuttle*, 3 *Comst.* 396.)

Third.—The amounts for which the assessment was laid were known to the assessors to be incorrect.

1. The amount for advertising, \$500, is shown by Allen's testimony to be double the correct amount.

2. The surveyor's fees were certified to by the street commissioner at \$3,001.14. The assessors put in \$6,683.17.

3. The salaries of the assessors and their clerks amounted in all to \$7,000. This amount is raised by taxation, and the assessors occupy one of the public offices in the city hall. There are, therefore, no expenses for which an assessment

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can be laid, nor was there anything to justify a charge for \$3,357.05. In addition to this the assessors had already, during the year, assessed upwards of \$10,000 for expenses of assessing. This assessment actually cost the corporation nothing; and a clear profit of \$10,000 had already been made that year out of assessment business.

These facts were known to the assessors, and the assessment of these amounts must be regarded in law, if not a fraud, certainly an irregularity.

Fourth.—The law provides that the expense shall be assessed upon the owners, &c., in proportion to the amount their lots are benefited. This assessment was increased by the two assessors, and as finally made, was “not at all with reference to the location of, or benefit to property,” “but only” with reference to finding blank spaces on the list to insert amounts. If a space was left for insertion of figures, the assessment was there made.

This can hardly be other than a fraud upon the assessed, and it is certainly a gross irregularity.

Fifth.—The order below should be affirmed.

By the court, LEONARD, J. This is an appeal on the part of the city from an order vacating an assessment in proceedings taken under the act of 1858.

The petitioner objects that the assessment has been prematurely imposed. The ordinance, authorizing the improvement, directs the work to be done at the expense of the city, for its more speedy execution. The work was not completed when the evidence was taken in the said proceeding, in August, 1864. Although the assessment was reported to the board of revision, &c., in January, and confirmed by that board in March, 1864.

It is indicated by the terms of the ordinance that the improvement was to be made by the city, under section 270 of the act of April 9, 1813. (*Vide Davie's Laws* p 567.)

It is provided by an act passed in 1824, chap. 49, that the authority given by section 270, of the act of 1813, shall apply to all the ordinances of the city for work to be done, and that the assessment therefor shall be made pursuant to sec-

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tion 175 of the same act. Referring to section 175 it will be seen that it contains no direction that the assessment shall be made before or after the work has been performed.

If the assessment precedes the performance of the work, it is entirely clear that an estimate of the expense must be first made: but after the work has been completed, and the expense has been paid or incurred, or definitely ascertained, the estimate is superfluous. (*Wetmore agt. Campbell*, 2 *Sandf. S. C. R.* 341.)

The same case was referred to and affirmed by the court of appeals, in *Manice agt. The Mayor, &c. of New York*, (4 *Seld. R.* 130). In the present case all the work had been contracted for, but a portion of it only had been completed when the assessment was made.

It thus appears that an estimate was necessary in order to ascertain the amount to be assessed. The assessors were sworn to make a just estimate and assessment, but the ordinance omits any direction for an estimate. The ordinance was adopted in November, 1856, and the assessors were named therein, the common council then being authorized to make the appointment. These assessors proceeded to make an estimate and assessment in October, 1863, which they reported in December following to the board of revision, &c., who are charged now with the duty of revising and confirming assessments. I think it not necessary that the duties to be performed by the assessors should be named in the ordinance. The law has prescribed the duty which they are to perform.

The assessors being appointed by the ordinance, were required to proceed and perform the duty which the law imposed upon them as such officers.

The objection that the assessment could not be made before the completion of the work, and that the assessors were not authorized to make an estimate upon which to found their assessment is not well taken.

Another objection is urged by the petitioners, arising out of subsequent proceedings, in respect to this assessment.

One of the assessors appointed by the ordinance in 1856,

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resigned on the 31st of December, 1863, after the assessment list had been reported to the board of revision, &c. On the 13th of January, following, that board returned the list to the assessors for correction. The two remaining assessors appointed by the said ordinance of 1856, acted, in making the corrections, without the concurrence of a third assessor, who had been appointed in the place of the one who had resigned, by the board of commissioners of taxes, &c., by the authority of the act which created that board, passed in 1859. It appears from the evidence that the newly appointed assessor was not invited to act in making the corrections of the assessment list because he had not been named in the ordinance.

The report of the assessors declares that they derive their appointment from the common council under the said ordinance. It has not been insisted that the two assessors, who were appointed by the said ordinance, had not authority to act after the act of 1859, making it the duty of the commissioners of taxes, &c., to appoint assessors. Nor is it claimed that they derive any authority to make an estimate or assessment by virtue of any appointment from that board.

The act of 1859, creating the said board, contains a provision authorizing a majority of the board of assessors to be appointed under that act, to make estimates and assessments. But the provisions of that act are not made applicable to the assessors theretofore existing. (*Sess. Laws, 1859, chap. 302, § 16.*)

The board of assessors consisted of three members, two appointed by the ordinance, and one by the board of commissioners of taxes, &c., but the two former only acted. It cannot be assumed that the other was notified, but neglected to meet with the other two because the evidence is, that it was thought best that he should not act, as he was not named in the ordinance. The statutory rule, as well as the rule of the common law, applicable before the act of 1859, requires all the members to meet and consult, although a majority may decide, unless special provision is otherwise made. (2 *R. S.* 555; *Doughty* agt. *Hope*. 3 *Denio*, 594.)

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That rule is the one to which the assessors in question were required to conform. They disregarded it. This was a legal irregularity, which rendered their action, after December 31, 1863, invalid. Under the act of 1859, if that rule was applicable here, it would be illegal to exclude one assessor from acting intentionally. It might be lawful for two to act if one neglected, or was unable to perform duty as an assessor.

The order appealed from must, therefore, be affirmed, with costs.

SUPREME COURT.

JOHN W. FRINK agt. THE HAMPDEN INSURANCE COMPANY.

Where, in a policy of insurance, the loss is made payable to a *third person*, who has no interest in the property insured, but claims the insurance as collateral security for liabilities incurred for the insured, prior to the insurance, he can, in case of loss, maintain an action for the insurance money, and recover in his own name.

Albany General Term, September, 1865.

Before HOGEBOM, MILLER and INGALLS, Justices.

APPEAL from an order of special term overruling demurrer.

The complaint alleges the defendants to be an incorporation, as an insurance company, under and by virtue of the laws of the state of Massachusetts; the application of one Richard Hurst, of the village of Cohoes, to the company, to be insured against loss or damage by fire upon certain property owned by him, for the term of one year from the first day of August, 1863; that the defendants became insurers, setting out the certificate of insurance in full, "loss, if any, payable to J. W. Frink, as collateral;" the destruction of the insured property of the value of more than the amount covered by the policy, and all the requisite steps to charge the defendants; that previous to the issuing of the certificate, the plaintiff had loaned to Hurst his promissory

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notes to an amount exceeding \$4,500, and which were in the hands of bona fide holders, and that he is still liable upon said notes to an amount exceeding the sum covered by the certificate ; that said notes are outstanding and unpaid ; that in consideration of the premium of \$112.50, the defendants, at the request of Hurst, agreed to pay loss, if any, to Frink, and the plaintiff, therefore, claims to recover the amount of the loss. The defendants demur generally, that the complaint does not state facts sufficient to constitute a cause of action.

S. HAND, *for defendants.*

IRA SHAFER, *for plaintiff.*

By the court, MILLER, J. It is not claimed that the plaintiff had any insurable interest in the property insured, but it is insisted that he was the appointee of Hurst the insured, to receive the loss, if any was incurred, and hence is entitled to maintain this action.

In *Grosvenor agt. The Atlantic Fire Insurance Company* (17 N. Y. R. 391), the action was brought by the mortgagee, to whom the loss was payable, and it was held that he could not recover because of a breach of the conditions of the policy by the mortgagor. The learned judge in this case, held that the plaintiff was the appointee of the party insured to receive the money that might become due from the insurers upon the contract. He says : " The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers."

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(*Macomber agt. The Bainbridge Mutual Fire Insurance Co.* 8 *Cush.* 133.)

He then proceeds to state that, "the insurance being upon the interest of the mortgagor, and he having parted with that interest before the fire, no loss was sustained by him, and of course none was recoverable by his assignee or appointee."

The effect of, and the irresistible inference to be drawn from these observations is, that but for the fact that the mortgagor had parted with his interest, and had sustained no loss, that the plaintiff could have recovered as his appointee. (See also *Bidwell agt. North Western Ins. Co.* 19 *N. Y. R.* 179, 183.)

The case above cited (17 *N. Y. R.* 391), establishes that the loss being payable to another party instead of the insured, was merely a designation of the person to whom it was to be paid after it had accrued, and was not an assignment of the policy, because payable to another.

In the case at bar, it was an insurance of Hurst, and the plaintiff was the appointee to receive the money in the event of a loss by fire. It was only an agreement collateral to and dependent upon the original undertaking, that *after* a loss had occurred, and not *before*, that the money should be paid over to the plaintiff, and not an assignment of the policy before any loss. If the case of *Grosvenor agt. The Atlantic Fire Ins. Co.* is a reliable authority, then it was not necessary for the plaintiff to allege in his complaint that he had an insurable interest, and the plaintiff to whom the loss was payable as appointee, can maintain this action, and unless there is some authority that overrules the doctrine laid down, it must be considered as conclusive in favor of the plaintiff's right to recover.

The defendants' counsel insists that there is such authority and our attention has been particularly directed to the case of *Freeman agt. The Fulton Ins. Co.* (14 *Abb.* 398), which is mainly relied upon to sustain an adverse theory. In that case one Stetson was the owner of the steamer Cataline, at the time of the issuing of the policy, and the defendants

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insured *the plaintiffs, or whom it might concern, and the loss, if any, was payable to the plaintiffs.* It was held that the complaint was demurrable, and that in order to recover upon a fire insurance policy for the amount of the loss, it must allege that the plaintiff had an interest in the thing insured at the time of the loss, unless the claim was assigned to him afterwards, or he sues as trustee of an express trust, and if he sues as trustee or agent, the complaint should allege the existence of such trust, and show his authority to collect the amount insured.

To make the case cited parallel to the one at bar, Stetson should have been the insured party, and the loss payable to the plaintiffs. As it stands, the plaintiffs, or whom it might concern, were the parties insured. The plaintiffs had no insurable interest, and Stetson was not insured, nor did it appear that the plaintiffs had acted as the trustees, or agents of Stetson, the owner.

Entirely a different question was presented from the one now considered, and I think the authority last cited is not in conflict with 17 *N. Y. R.* And although referred to approvingly in *Fowler agt. The New York Indemnity Ins. Co.* (26 *N. Y. R.* 425), yet I understand it was only for what it actually did decide, and not as sustaining a doctrine adverse to the former case.

The facts presented by the complaint here, do not show an assignment before loss to a party who had no interest in the property within the principle of several cases to which we have been referred. (*Peabody agt. Washington Ins. Co.* 20 *Barb.* 340; *Fowler agt. New York Indemnity Ins. Co.* 26 *N. Y. R.* 423; *Russ agt. Life Ins. Co.* 23 *N. Y. R.* 516; *Hooper agt. Hudson River Ins. Co.* 17 *N. Y. R.* 427; *Granger agt. Howard Ins. Co.* 5 *Wend.* 202.) But a case where the relation of insurer and insured existed between the defendant and Hurst, the owner of the property, until a loss had taken place, when the plaintiff, as the appointee of the insured, steps in and claims, under the agreement, that the defendants should pay the money to him.

There are several other points urged by the defendants'

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counsel that cannot be upheld, if the views already expressed are sound and maintainable, and hence a discussion of them is not required.

My opinion is that the case of *Grosvenor agt. The Atlantic Fire Ins. Co.* is a decisive authority upon the question discussed, and that the demurrer to the plaintiff's complaint was not well taken.

The order overruling the demurrer must be affirmed with costs, with leave to withdraw the demurrer and put in an answer upon the usual terms.

SUPREME COURT.

JERONEMUS H. UNDERHILL, respondent agt. THE NORTH AMERICAN KEROSENE GAS LIGHT COMPANY, appellants.

Where the defendants, by a specification and drawings, dated the 4th of January, 1859, invited proposals for the construction of twenty-seven meerschaums, to be constructed thereunder of brick, deliverable at different times prior to the first day of July, 1859—specifying that eight (the remainder of the twenty-seven) were to be delivered on the first day of July, and containing a clause “*Any number at our option ;*” also, “in addition to the above, we wish to estimate for the same number of iron meerschaums to be delivered as above,” giving a description of the latter ;

And the plaintiff proposed, in writing, to construct twenty-six or twenty-seven of the brick meerschaums for \$1,650 each, or twenty-six or twenty-seven of the iron meerschaums for \$1,850, in accordance with the plans of January 4, 1859,” all the above to be in accordance as first plan and specifications, and to be delivered at such dates, and in such numbers, as the company may specify, in the next sixty-five days.” Which offer was accepted in writing by the company. The plaintiff, after constructing seven meerschaums, was prohibited by the defendants from manufacturing any more, as they had failed to pay, and had become insolvent :

Held, that the defendants, by expressing “any number at our option,” would seem to reserve the right to *increase and not diminish* the whole number of meerschaums to be manufactured :

Held also, that the defendants, having accepted and assented to the plaintiff's proposition, and the terms named, which varied their proposal, were liable for the whole number of meerschaums (27).

Held also, that the correct rule of damages was to allow the plaintiff the *actual profit* on each meerschaum (20) left unmanufactured.

New York General Term, November, 1865.

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Before INGRAHAM, P. J., LEONARD and BARNARD, *Justices*.

THIS case came up on appeal from a judgment entered in favor of the plaintiff for \$17,479, in October, 1863. It had been tried twice before a referee, and twice on appeal argued before the general term.

The facts of the case were as follows :

On the 4th of January, 1859, the company desired estimates on some pipes for the manufacture of kerosene oil, called meerschauts, which they proposed to build of iron or brick. For that purpose a specification and some drawings were prepared for the proposals of mechanics. In those specifications the company desired twenty-seven meerschauts to be constructed thereunder, of brick, deliverable at different times prior to the first day of July, 1859. After specifying that eight (the remainder of the twenty-seven) were to be delivered on the first day of July, the specifications contained a clause, "any number at our option," and then continued: "In addition to the above we wish estimates for the same number of iron meerschauts to be delivered as above." It then proceeded with a description of the iron ones so desired. The plaintiff, as one of the mechanics to whom these plans and specifications were delivered for proposal, concluded to make an estimate for twenty-six or twenty-seven of the meerschauts. On the 10th January, 1859, he wrote a proposal to the company to the effect that he would contract to construct twenty-six or twenty-seven of the brick meerschauts for \$1,650 each, or twenty-six or twenty-seven of the iron meerschauts for \$1,850.

They were to be constructed in accordance with the first plan and specifications, dated January 4th, 1859, and to be delivered at such dates, and in such numbers, as the company might specify in the next sixty-five days. On the the same day, the secretary and acting business man of the company, assents to the proposition of the plaintiff, and wrote to him to that effect.

The plaintiff constructed seven meerschauts, each of twenty-five tons capacity, and made one of one hundred

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tons as an experiment. The company failed subsequently, did not pay their notes, and went into insolvency. The plaintiff was left with a large amount of manufactured iron on hand, and had gone to great expense to carry out the contract. The cost of each meerschau was \$1,020, which allowed to the plaintiff a profit of \$830 on each machine, amounting in all, on the twenty left unmanufactured, to \$16,600. The plaintiff brought his action to recover those damages. On the first trial the referee found all the facts in favor of the plaintiff, excepting he held that by the written memorandum, subjoined to the specification, the option of any number of the meerschaus to be delivered was reserved to the company, and constituted one of the terms of the contract; and in stopping the work the defendants did what they had a right to do, and were not responsible for the damages sustained by the plaintiff on the work not executed but contracted to be done. From this report the plaintiff took an appeal to the general term, which in the February term, 1862, reversed the judgment, holding that the proposal of the plaintiff, in making his estimate to the company to build twenty-six or twenty-seven meerschaus and in adding the clause "all the above to be in accordance with the first plan and specification dated 4th inst., and to be delivered at such dates and in such numbers as you may specify within the next sixty-five days," proposed a variance from the terms named by the defendants in respect to the option. That the offer was to build the whole number mentioned, giving the defendants sixty-five days with which they are required to specify the dates and numbers of the deliveries. To this proposition made by the plaintiff, the defendants reply in writing on the same day, and "assent to the proposition and terms therein made." This, therefore, constituted an agreement for twenty-seven meerschaus; the variation in the contract proposed by the plaintiff was assented to by the defendants. After the reversal, the cause was tried a second time before the same referee, and on the new trial much testimony was taken, and a judgment was rendered in favor of the plaintiff for \$16,600, on which judg-

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ment was entered for the amount before stated. From this latter judgment the defendant took an appeal to the general term, and the cause was again argued during the present term.

SAMUEL E. LYON, *for appellants.*

D. McMAHON, *for respondent.*

By the court, LEONARD, J. The contract between the parties remains substantially as it appeared when the case was before the general term on a former occasion (36 *Barb. R.* 354, 356). The specification or writing whereby the gas company invite proposals, is rather indefinite as to the option which they claim. Still I incline to the opinion that the option as expressed in the said invitation, reserves the right to increase and not to diminish the whole number of meerschauums to be manufactured. The gas company name five dates or times for the delivery of a definite number, amounting in all to twenty-seven, and then invite an estimate for "the same number of iron meerschauums, to be delivered as above." There is nothing to indicate that they wished an option to take a less number. Perhaps it was designed to secure an option to change the number deliverable at the several dates specified. Whatever meaning the gas company may have intended to attach to the option, the plaintiff in his answer makes it specific and certain.

He makes his estimate for twenty-six or twenty-seven meerschauums of the two different descriptions required, and then adds, "*all the above* to be in accordance as first plan and specifications, and to be delivered at such dates and in such numbers as you may specify within the next sixty-five days."

Here the option relates only to the dates and numbers of the several deliveries. There is no option as to the whole number, except that it is not stated whether there shall be twenty-six or twenty-seven. The defendants assent to the proposition and terms named. All the other questions related to the facts as found by the referee, so far as anything was argued before us. The evidence sustains the facts as

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found, in my opinion. The chief question was whether the parties agreed to cancel or abandon this contract. The agents of the gas company testify to facts tending to show that the plaintiff consented to cancel or abandon the contract, in consideration that the company would give him whatever other work they might have to be done, and that the company furnished the plaintiff the work.

The plaintiff puts an entirely different construction upon the new agreement. According to his evidence, there were some propositions, never amounting, however, to an agreement, to change the written contract. No new agreement was ever reduced to writing; and the old contract in writing was never surrendered, although the plaintiff was asked to do so.

This last fact has a strong bearing on the subject. If a new agreement had been made, it seems most probable that the old one in writing would have been actually canceled or surrendered.

The rule of damages is correct.

The judgment should be affirmed, with costs.

SUPREME COURT.

JOHN G. WHITE, respondent agt. THOMAS SCHUYLER, appellant.

If a *written agreement* is signed by the party sought to be charged, and is certain, fair and just, in all its parts, it is not necessary that it should be signed by the party seeking to enforce it, in order to its *specific performance*. That is, the want of *mutuality* is no objection to its enforcement.

A written agreement to re-convey, at a certain time, for a valuable consideration, a certain number of shares of the capital stock of a "Steam Tow boat Association," and to pay certain dividends received thereon, may be *specifically performed*, notwithstanding an objection that the contract relates to a class of property in regard to which it is not usual to direct a specific performance, on the ground that the party has an adequate remedy at law in damages. There may or may not be an adequate remedy at law, and besides the parties have specifically agreed to re-convey.

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Where the *time* within which an agreement is to be performed is purely a question of *fact*, which has been considered with care by the judge at special term, the court at general term will not usually disturb the decision made thereon.

Albany General Term, September, 1865.

Before HOGEBROOM, MILLER and INGALLS, Justices.

THE defendant appeals from a judgment in favor of the plaintiff, rendered under the direction of Mr. Justice MILLER, on a trial before him, without a jury, at the Albany circuit, in May, 1864.

The action was brought to compel the defendant to transfer to the plaintiff one hundred and eighty-two shares of the capital stock of "Schuyler's Line Steam Tow Boat Association," and to pay him certain dividends received thereon, which the defendant claimed to hold as his own property by virtue of a contract dated June 2, 1862. The judgment was for a specific performance of this contract. No costs of the action were given to either party as against the other.

The leading features of the case are, as found by the justice who tried the cause, as follows :

Prior to the 2d of June, 1862, the plaintiff was the owner of one hundred and eighty-two shares of the capital stock of "Schuyler's Line Steam Tow Boat Association," of the par value of \$18,200, for which a certificate had been duly issued; and on the 2d of June, in consideration of \$15,000 paid by the defendant on account of the plaintiff, the stock was delivered to the defendant, and thereupon he gave the plaintiff an agreement in writing to the effect that Schuyler would, on the 1st day of February, 1863, upon payment by White to him of \$16,500, and indemnifying him against any loss on account of having indorsed his paper, sell and convey to White the one hundred and eighty-two shares of stock in question, with any dividend which it should earn in the year 1862, and if at that time the value of the stock was more than \$16,500, the excess in value should be paid to M. H. Read, receiver of the bank of the capitol, on the indebtedness of White to said receiver, if the said indebtedness should not sooner be paid. That on the 10th of February, 1863, the defendant received \$9,100 for a dividend on

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said stock, and on the 10th of February, 1864, a further dividend of \$5,460.

That on the part of the defendant there was a waiver of strict performance by the plaintiff on the day named, and the time was extended, and within the extended time plaintiff tendered the defendant \$16,500, and demanded the stock and dividends, and the defendant refused to transfer the stock or pay over the dividends.

That the defendant has not sustained any loss by reason of indorsing the plaintiff's paper, and is not under any liability on that account; and the indebtedness of the plaintiff to the receiver of the bank of the capitol, has been fully paid and discharged.

Upon these facts found, a judgment was directed that upon payment of \$16,500, with interest from February 1, 1863, deducting the dividends received by the defendant, the defendant transfer the stock to the plaintiff, with all dividends and accumulations since the 10th of February, 1864.

The testimony is, in some respects, conflicting, especially in regard to the extension of the time for performance, and to what period such extension was made.

JOHN H REYNOLDS, *for plaintiff, respondent.*

IRA SHAFER, *for defendant, appellant.*

By the court, HOGBOOM, J. No other objections to the enforcement of the specific performance of this contract are made than the want of mutuality, and the failure on the part of the plaintiff to perform, or offer to perform, within the stipulated time; 2 *Story's Equity Jurisprudence*, sections 729, 736, are cited in support of the proposition as to want of mutuality, but I do not see that they are directly applicable. On the contrary, the same author, at section 736 a., states as follows: "But it is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it; if the agreement is certain, fair and just, in all its parts, and signed by the party

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sought to be charged, that is sufficient, *the want of mutuality is no objection to its enforcement.*" The following authorities are cited in support of this doctrine: (*Woodward* agt. *Aspinwall*, 3 *Sandf. S. C. R.* 272; *In re Hunter*, 1 *Edw. Ch. R.* 1; *McCrea* agt. *Purmort*, 16 *Wend.* 460; *Clason* agt. *Bailey*, 14 *John. R.* 484.)

It is not objected that the contract relates to a class of property in regard to which it is not usual to direct a specific performance upon the ground that the party has an adequate remedy at law in damages. But, if such objection had been taken, I think it ought not to have been sustained. 1. Because the parties evidently contemplated, and specifically contracted, for a re-conveyance of the stock. 2. Because, as well on account of the uncertain value of the stock in market, and the infrequent sales of it, as the varying character and success of the business which the stock represented, it was difficult, if not impossible, to do justice between the parties in an award of damages. These are controlling reasons in equity for a specific performance. (*Philips* agt. *Berger*, 2 *Barb.* 609; 2 *Story's Eq. Tit. Specific Performance*, § 716 to 719; 6 *Johns. Ch. Rep.* 222; *Seymour* agt. *Delancey*, 3 *Cow.* 445.)

The other objection to a specific performance, to wit, the omission to perform within the time, to which the right of performance was extended by the stipulation or understanding and conduct of the parties, involves a question of fact. The judge at the special term, before whom the cause was tried, has examined that question with care; has evidently given to it much attention; and, notwithstanding the criticisms of the learned counsel for the appellant, was, I think, warranted in his conclusions upon a review of the testimony, which upon scrutinizing the witnesses, he was permitted to take. I do not deem it necessary to review the facts, nor to re-state the conclusions which the testimony justifies. I am myself of opinion that upon the plaintiff's version of the conduct and understanding of the parties, the contract was fairly open for performance up to the 28th of February, and that the unequivocal refusal of the defendant to perform on

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that day, either rendered an absolute tender and offer to perform before suit brought unnecessary, or made the tender on the 16th of March, as preliminary to the institution of a suit for specific performance in season, especially as the court below did not charge the defendant with costs.

I am, therefore, of opinion, if we are to put the same interpretation upon the character of the contract that the judge did at the trial of the cause, that the judgment should be affirmed with the costs of appeal.

This makes it unnecessary to examine the other question made in the case, to wit: whether the whole transaction was not in the nature of a security for the loan of money.

If that question be open for examination here, and doubt in regard to the other aspect of the case made it expedient for the plaintiff to present it, I should be loth to enter upon the examination after an adverse conclusion by the court below, and a decision in favor of the plaintiff on other grounds, and in general, should think it better to remand the case for the purpose of re-examination, and the presentation of a distinct exception or review on that point by the party aggrieved.

I am for affirming the judgment of the court below, with costs.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF COURTLANDT PALMER, TO HAVE ASSESSMENT FOR BUILDING SEWER IN THIRTY-FOURTH STREET VACATED AS TO CERTAIN PROPERTY ASSESSED.

Where *assessors* in the city of New York, appointed to assess lands for a local improvement, assess the lots of an owner at more than one-half the value of such lots, as valued by the *assessors of the ward* in which the same are situated, it is a violation of the statute (*Laws 1840, chap. 826, § 7*), and a *legal irregularity*, and the court is authorized, under the act of 1858 to vacate and set aside such assessment.

The objection that the *confirmation of the assessment* is conclusive as to all questions of regularity not raised prior to the confirmation, cannot be sustained in such a case, as the act of 1858, does not require any such preliminary proceed-

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ing to entitle a party aggrieved to the benefit of the statute. The whole provision of the act of 1858 is in reference to relief from assessments *after confirmation*.

The act (*Laws of 1861, p. 702*) creating a board of revision and correction of assessment lists—composed of the comptroller, counsel to the corporation and the recorder of the city—seems to require that all three of the members *should meet together* for the purpose of acting, but it prescribes that a vote of a majority of such board shall decide the questions in regard thereto.

New York General Term, November, 1865.

Before INGRAHAM, P. J., LEONARD and BARNARD, Justices.

THE petitioner being owner of certain property under water, discovered that an assessment had been laid upon his property, and applied to have the same vacated, pursuant to an act of 1858, upon the grounds :

First.—That the board of revision and correction of assessments had never in fact had jurisdiction to act, nor had legally acted upon the assessment.

Second.—That the assessment was contrary to the provision of the act which limits amounts of assessments to one-half the value of the property, as valued by the ward assessors, the assessment being for this sewer from one hundred and forty-two to one hundred and ninety-three dollars, upon lots assessed by the ward assessors at only one hundred dollars.

Third.—That the property being under water was not liable to assessment in any case.

Fourth.—That the property was not liable to this assessment, as being below tide water, it could not possibly be drained or benefited by a sewer.

A judgment order was given vacating the assessment, pursuant to the act. From this an appeal is taken on the part of the corporation.

JOHN E. DEVELIN, *counsel to the corporation.*

Appeal from a judgment rendered at special term, vacating the above assessment as to certain lots belonging to the petitioners. The objections to the validity of the assessment are three in number :

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First.—That the assessment has never been legally confirmed.

Second.—That the assessment upon the lots of the petitioners exceeds one-half of the assessed valuation of those lots in the ward in which they are situated.

Third.—That the lots are not benefited by the improvement for which the assessment was laid.

I. The objection that the assessment has never been legally confirmed cannot be sustained.

(a) The petitioner insists that the confirmation of the assessment in the absence of the recorder was void, within the rule that, when power to do an act is conferred upon three or more persons, all must meet and consult even though a majority may act. This rule does not apply in the present instance, because of the provision of the statute creating the board of revision, which declares that, in case an assessment is not confirmed within thirty days after it is presented for confirmation, it shall be deemed confirmed (*Laws of 1861, chap. 308, p. 702, § 1*).

This assessment was received from the board of assessors on the 11th day of July, 1861.

The assessment, therefore, was confirmed by force of the statute on the 13th day of August, 1861. It is certain that the recorder knew of the confirmation after it was made, since he was present at the next meeting of the board of revision, on the 24th day of July, 1861, and approved of the minutes of the 11th of July, 1861, which recited that this assessment list had been received and confirmed.

On the 24th day of July, 1861, every member of the board of revision knew that the board of assessors had transmitted this assessment list to them for confirmation, and, if prior to this date no valid action had been taken by them to confirm the assessment, it at once became their duty to take some step toward its confirmation; and in default of any action upon the part of the board of revision the assessment list was confirmed by force of the statute on the 25th day of August, 1861, that date being thirty days after it was known to each member of the board of revision

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that the list had been presented for confirmation. Such clearly must be the result if any force is to be given to the provision of the act of 1861 (*Laws of 1861, supra*).

(b) The *presence* of the recorder at the meeting of July 11, 1861, was not indispensable to the validity of the act of confirmation, for the rule relied upon by the petitioner is not without exception, but is subject to the reasonable modification that, when all the persons invested with power to perform an act are notified, a majority may meet and act, and their action will be valid. (*Horton agt. Garrison*, 23 Barb. 176; *People agt. Walker*, 23 Barb. 304; *People ex rel. McSpedon agt. Supervisors*, 10 Abb. Pr. R. 233.)

In the absence of all negative testimony it should be presumed that the recorder was notified of the meeting of July 11, 1861, and neglected or refused to attend. Presumptions similar in character have met with the approval and received the sanction of the courts, as will appear from an examination of the following authorities: (*Yates agt. Russell*, 17 Johns. 461; *McCoy agt. Curtice*, 9 Wend. 17; *Downing agt. Rugar*, 21 Wend. 178; *Doughty agt. Hope*, 3 Denio, 249; *Miller agt. Garlock*, 8 Barb. 157; *Tucker agt. Rankin*, 15 Barb. 471; *People agt. Carpenter*, 24 N. Y. 86.)

Indeed, it has ever been the rule that, in these proceedings to vacate assessments under the act of 1858, "it is necessary for the petitioners to make out affirmatively the irregularity of the proceedings, and not throw upon the city the necessity of proving its proceedings regular before they are impeached" (*Babcock's case*, 23 How., 118).

Especially ought the presumption to be indulged, and the rule prevail, as respects an objection so technical as that which is urged against the validity of the confirmation of this assessment.

II. The objection that the property of the petitioner is not benefited by the assessment, and the further objection that the amount assessed upon the lots exceeds one-half their value as valued by the ward assessors, are not available to the petitioner.

(a) The question of benefit was one which rested in the

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judgment of the assessors. They decided that question in the affirmative. In street opening cases, which, so far as the assessments for benefit are concerned, are precisely analogous to cases of assessments for local improvements, questions of value and benefit are never reviewed upon the presentation of the commissioners' report for confirmation, unless the objections were taken before the commissioners. (*Harman street*, 16 Johns. 231; *Matter of Pearl street*, 19 Wend. 649; *John and Cherry streets*, 19 Wend. 657; *William and Anthony streets*, 19 Wend. 680; *Owners of ground agt. Mayor*, 15 Wend. 374, 377; *Lyon agt. City of Brooklyn*, 28 Barb. 609; *Washington Park, Brooklyn*, 1 Sandf. 283.)

The act of 1841 furnished an opportunity for the petitioner to raise this objection before confirmation (*Laws of 1841*, p. 143.)

No objections having been presented, the petitioner ought not to be permitted to raise it at this late hour.

It is clear that, in order to vacate the assessment upon the ground that the petitioner's property was not benefited by the improvement, the court must substitute its own judgment for that of the assessors, and convict those sworn and disinterested officers of error upon the mere opinion of the petitioner whose interest it is to have the assessment vacated.

The assertion and argument in support of this objection is that the petitioner's property derives no *present* benefit from the improvement. Conceding the fact to be as asserted, it is still without force, for the reason that the assessors, in making their assessment, had a right to consider the *prospective* benefit to the petitioner's property. (*Downer agt. City of Boston*, 7 Cush. 277; *Wright agt. City of Boston*, 9 Cush. 233.)

(b) The objection that the assessors assessed the petitioner's property an amount exceeding one-half its value as valued by the ward assessors is not available to the petitioner. The confirmation of the assessment is conclusive upon all questions of regularity not affecting the jurisdiction of the assessors, and which were not raised prior to the

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confirmation of the assessment. (*Miller's case*, 12 *Abb.*, 121; *Babcock's case*, 23 *How.* 118; *Sandford agt. Mayor*, 33 *Barb.* 147; *People agt. City of Rochester*, 21 *Barb.* 657, 671.)

In *Miller's case*, LEONARD, J., treats the act of confirmation as a *judgment* of a tribunal of special and limited jurisdiction, which, in cases free from fraud, and when none of the steps requisite to give jurisdiction have been omitted, is *conclusive* upon parties and privies.

(c) It is apparent that it would be unjust to the corporation to vacate the assessment for the reasons urged. Had the attention of the assessors been called to these objections upon the publication of the notice by them inviting objections to the assessment, they could then have corrected their mistake, and distributed the surplus among the owners of other property benefited by the improvement. It was the petitioner's neglect which occasioned him the injury, and he now seeks to be excused from the consequence of that neglect and have it visited upon the corporation. The case is not distinguishable from that of *Babcock's* (23 *How.* 118), and the objections should not receive greater indulgence than was accorded to those relied upon in that case.

III. The judgment vacating the assessment should be reversed.

HENRY H. ANDERSON, *for petitioner.*

Preliminary.—No appeal lies from an order entered in these proceedings vacating an assessment. The order made by the justice in vacating the assessment is final, and not subject to review (*Matter of Dodd*, 27 *N. Y.* 629).

But if an appeal can be entertained, the order was right, and should be sustained.

First.—The act of May 13, 1840 (*Val. Laws*, p. 1244, § 7), is explicit and prohibitory, and was wholly disregarded. The provision is, that "assessors making assessments authorized by law shall in no case assess any house, lot, improved or unimproved lands more than one-half the value

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of such house, lot, &c., as valued by the assessors of the ward in which the same shall be situate."

It was beyond the power of the assessors to make a valid assessment beyond such one-half. This they have attempted to do, and their attempt must fail. The decision below was on this ground correct.

Second.—The proofs disclose that the assessment list in question was in fact never presented to the board of revision and correction of assessments, nor was it acted upon by that board even so far as to confer in regard to it.

(a) The act of 1861 (*Laws of 1861, p. 702; Val. Laws, p. 480*) vests the power theretofore vested in the common council relative to confirmation of assessment lists "exclusively in the comptroller, the council to the corporation, and the recorder of said city, who *together shall constitute a board* of revision and correction of all such assessment lists, and the vote of a majority of *such board* shall decide the questions in regard thereto."

It is further provided that all assessment lists shall be confirmed within thirty days after the same are presented to *the said board*.

The requirement of the law, then, is, that three persons named should be together in order to constitute the board. This requirement was made as a protection to the owners of property to be charged with the payment of expenses of improvements whose objections are to be heard and considered by *the board*, and is part of that series of acts which are to be strictly obeyed. Unless, therefore, the three met there would be no lawfully organized board of which a majority could vote. Each person assessed was entitled to the weight of the opinion of all three.

(b) It appears by the testimony of R. A. Storrs that on the occasion at which this list came from the assessors only two members were present, and that it was never acted upon nor considered at any other meeting, nor did the *three* at any time receive or confer respecting it.

Third.—The principle is too well settled to be now disturbed, that where any three persons (not a court) are

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appointed to act *judicially* upon a public matter they must all *confer*, but a majority may decide, and this rule is rigidly enforced in cases tending to divest a man of title to his property.

The case at bar is even stronger than any of the adjudicated cases, for this statute provides not simply that the three persons named shall constitute a board, but that they *together* shall constitute it. (*Doughty* agt. *Hope*, 1 *Comst.* 82; *Ex parte Rodgers*, 7 *Cow.* 526; *The People* agt. *Walker*, 23 *Barb.* 304; *Lee* agt. *Perry*, 4 *Denio* 125; *Sharp* agt. *Johnson*, 4 *Hill* 99; *The King* agt. *Forrest*, 3 *D. & E.* 38; *The King* agt. *Inhab. of Hamstall Ridware*, 4 *D. & E.* 380; *Powell* agt. *Tuttle*, 3 *Comst.* 396.)

Fourth.—The property of the petitioner was not within the jurisdiction of the assessors. It was under water and not within the description of assessable property. The property liable to assessment must be such as could reasonably be said to be subject to occupancy. Assessable property must be houses or *lots* of land, such lots being such description of property as might have houses erected thereon.

The property assessed was under water, below tide water, and could neither be built upon nor drained by the sewer. The only effect of the construction of the sewer would be, if at any time the land should be made and lots created upon the said property, to conduct the water to such property.

Fifth.—The assessment was properly vacated, and the order below should be affirmed.

By the Court, INGRAHAM, P. J. This appeal is from an order vacating an assessment on lots on Thirty-fourth street for building a sewer.

It appears from the decision of the justice at special term, that the same was made on the fact that the assessors assessed the lots of the petitioner at more than half the value of such lots, as valued by the assessors of the ward in which the same are situated. The proofs show that the lots were valued by the assessors as worth one hundred

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dollars and were assessed each from one hundred and forty-two dollars to one hundred and ninety-three dollars.

By the act of 14th May, 1840 (*ch.* 326, § 7), it is enacted that the assessors shall in no case assess any house, lot, improved or unimproved lands more than one-half the value of such house or lots, &c., as valued by the assessors of the ward in which the same shall be situate. The act of 1841 in no ways amends this section of the act of 1840.

The subsequent change in the mode of appointing assessors to a board of assessors (*Sess. Laws*, 1859, *ch.* 302), requires the board to make the assessments in accordance with existing laws, and did not therefore affect these provisions.

It is very clear that the assessors erred in charging upon the lots of the petitioner a greater sum than one-half of the assessed value. Their power in this respect was limited by the statute, and when they exceeded it they committed an irregularity in laying the assessment in violation of the law. It seems to me to be clear that this is within the provisions of the statute of 1853, under which this proceeding is taken. That act provides for this application whenever "in the proceedings relative to any assessment for local improvements any fraud or legal irregularity shall have been committed" and that the assessment may be vacated. In this case the error consists in laying the assessment on lots to an amount exceeding one-half the assessed value. It was clearly contrary to the law and is in my judgment a legal irregularity as contemplated by the act.

The counsel for the corporation does not object to the action of the special term on this ground, but he contends that the confirmation of the assessment was conclusive as to all questions of regularity not raised prior to the confirmation. I think it would be a sufficient answer to this objection to say that the act of 1853 does not require any such preliminary proceeding to entitle a party aggrieved to the benefit of the statute. The decisions in regard to opening streets, &c., are referred to, but those proceedings are entirely distinct. There the objection is to the confirmation,

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and is required to be made after notice is given of an application to the court for confirmation, and when confirmed the assessment is made conclusive upon all persons whomsoever. No such provision is made as to assessments for local improvements, but notice is to be given of the assessment and parties aggrieved are notified to present their objections. It may be a good objection that the party did not make objections to the assessors, if complaint was made to the board of revision, &c., to prevent the confirmation, but it extends no further. The whole provision of the act of 1858 is in reference to relief from assessments after confirmation.

It is also contended that the assessment never was confirmed, because only two of the members of the board met when it was acted upon.

Where a board is formed for the purpose of acting as this board is authorized to act, the rule undoubtedly is that all the members should meet together, but that the acts of a majority are valid, unless the statute authorizes a less number to act. (*Downing* agt. *Ruger*, 21 *Wend.* 178; *Powell* agt. *Tuttle*, 3 *Comst.* 396; *Doughty* agt. *Hope*, 1 *Comst.* 79.)

This construction is strengthened by the words of the act which says that the persons appointed shall "*together constitute* a board of revision and correction of all such assessment lists, and the *vote* of a majority of such board shall decide the questions in regard thereto. This seems to require the presence of all the members, but allows a confirmation by the vote of a majority. In the statute relative to opening streets, &c., it is expressly provided, in order to meet this difficulty, that any two of the commissioners might execute and perform the duties of their appointment (*Act of 1813*, 2 *R. L.* § 188). No such provision is to be found in the act of 1813 requiring the appointment of assessors for such local improvements, nor in the act of 1858. It is not however necessary to put the decision of this case upon this ground. The first objection which I have examined is so plainly within the provisions of the act of 1858 that it is unnecessary to examine the others.

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The order appealed from should be affirmed with costs.

I think the assessors exceeded their power by imposing an assessment exceeding one-half the assessed value of the lots.

WM. H. LEONARD.

SUPREME COURT.

NATHAN M. SEAMAN agt. THEOPHILUS CIVILL.

The defendant leased to the plaintiff certain premises, with a clause therein as follows: "In case the said Civill shall sell the said premises at any time after the first two years, he shall pay to said Seaman fifty dollars, and allow him to gather the crops there sown or planted upon said premises, and Seaman to give it up to said Civill." After two years Civill sold the premises to Seaman, the plaintiff and lessee, and Seamen brought this action to recover the \$50: *Held*, that he could not recover.

Albany General Term, December 1865.

Before HOGEBOM, PECKHAM, MILLER and INGALLS, Justices.

THIS is an appeal from a judgment of the county court of Albany county, affirming the judgment of the justices court in the above action. The defendant leased to the plaintiff certain premises situated in Castleton, for the term of five years, subject to the following provision: "In case the said Civill shall sell the said premises at any time after the first two years he shall pay to said Seaman fifty dollars, and allow him to gather the crops there sown or planted upon said premises *and Seaman to give it up to said Civill.*" The lease bears date January 23d, 1860. On the 16th day of May, 1863, Civill sold and conveyed the said premises to Seaman, who continued in the possession thereof. The action was brought by Seaman to recover the fifty dollars, and judgment having been rendered against him in justices court, he appealed therefrom to the county court of Albany county, where the judgment was affirmed.

JOHN H. REYNOLDS, *for appellant.*

IRA SHAFER, *for respondent.*

By the court, INGALLS, J. In construing the instrument

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in question the intention of the parties is to be ascertained, if possible, and when ascertained carried into effect so far as the rules of law will permit.

I think it may be fairly inferred from the provision of the contract that it was the intention of the parties that the fifty dollars should be paid only in the event of a sale of the premises to a third party.

By the above provision of the lease Seaman, in case of sale, was to have not only the fifty dollars but *also the right to gather the crops*, which latter privilege is inconsistent with the idea of a sale of the premises to himself which would embrace that right. But it was further provided that Seaman *should surrender up the premises to Civill in case of sale*, which is only consistent with the idea of a sale to a third party. No such surrender could have been contemplated if Seaman became the purchaser, as it would be in effect surrendering the premises to himself, when the lease only provides for a surrender to Civill.

It is quite obvious that the payment of the fifty dollars and the right to remove the crops, was intended as a compensation to Seaman in case he was deprived of the possession of the premises before the expiration of his term by a sale to a third party. Such is a fair and reasonable construction of the contract. Seaman has voluntarily purchased the premises and continued in the undisturbed possession of the same. If it had been the understanding of the parties that the fifty dollars was to be paid in case of sale to Seaman, it is but reasonable to infer that such sum would have been deducted from the purchase price of the premises, or some other provision then made for the payment thereof. This is a consideration of some significance bearing upon the question, as to the intention of the parties in regard to the payment of the fifty dollars, and indicates either that the plaintiff did not deem himself entitled to the money, or intended to waive the payment thereof.

The plaintiff has failed to establish a case entitling him to recover, and the judgment of the county court must be affirmed with costs.

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SUPREME COURT.

JOHN IVES AND JOHN MCCREDY agt. JOHN SHAW.

A party is not entitled to a bill of particulars upon demand in writing, under section 158 of the Code, where the claim of his adversary is for the violation of a special contract, and the consequential trouble and expense resulting therefrom.

Watertown Special Term, November, 1865.

THE complaint in this action contained three counts; the first of which alleges the making of a special contract by which the defendant agreed to receive, kill and pack for the plaintiffs certain beef or barreling cattle on a day named; "that acting upon the said agreement, and in order to have their cattle ready at the yards of the defendant in Deerfield, as he had directed, on that day, the plaintiffs were put to great necessary expense and trouble in breaking roads and driving said cattle, and in caring for them; that they had the said cattle to the number of 131 head ready for the said defendant to kill on the day appointed by him, but the defendant refused and neglected to receive, or kill and pack them, and neglected and refused to perform his said contract for the space of thirteen days, although often requested so to do; that by reason of such neglect and refusal, the plaintiffs were greatly damaged by being put to great expense and trouble in the care and feeding of said cattle, and by reason of the shrinkage thereof."

The second count alleges another similar agreement subsequently made, together with a similar breach, "whereby the plaintiff suffered great damage in the trouble and expense of taking care of and feeding said cattle, and in the shrinkage thereof."

The third count sets forth the items of an account, but gives no dates except the words "all before the 24th day of November, 1862."

The defendant having by his attorney, served a demand in writing of a copy of the items of the plaintiffs' demand (under section 158 of the Code), which has not been com-

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plied with, now moves on due notice and a stay of proceedings pending the motion, for an order precluding the plaintiffs from giving evidence on the trial of the several demands and damages set forth in their complaint.

HAMMOND, *for the defendant.*

STEPHEN K. PRATT, *for the plaintiffs*

MULLIN, J. The defendant was not entitled to a bill of particulars. The damages sought to be recovered under the first and second counts of the complaint, are not matters of account within the meaning of the Code. Nor is the defendant entitled to a bill under the third count, as that specifies particularly the items sought to be recovered.

The motion is therefore denied, but without costs. The plaintiffs to have twenty days further time in which to reply.

SUPREME COURT.

RACHEL S. LANSING, appellant agt. DOUW F. LANSING, Executor of the last will and testament of PETER LEVERSEE, deceased, and JANE ANN LANSING, respondents.

The testator by his will directed his executor, at the expiration of four years after his decease, to invest out of his estate, upon safe and sufficient real estate securities, at the legal rate of interest, the sum of \$3,000, and to keep the same invested for the benefit of his grand daughter, Rachel S. Lansing, until she shall attain the age of twenty-one years, or until her death, applying the interest that might be received from said investment, or so much thereof as might be necessary toward the support and education of said Rachel, and when she shall attain the age of twenty-one years his executor is to pay her the sum of \$3,000, with the accrued and accumulated interest, except so far as the use thereof has been necessary as aforesaid, and by said executor deemed proper for the education and support of said Rachel; and subject to the like necessity his executor is directed to reinvest safely and securely the interest he may receive during such investment, for the like benefit of said Rachel. After some other bequests the residue and remainder of the estate is disposed of, subject to the previous payment of the legacies and investments by the executor :

Held, 1st. On a final accounting of the executor before the surrogate, that the fund in the hands of the executor for the benefit of Rachel S. Lansing was held

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by him in his character as an *executor*, and not as trustee, and he was entitled to a *commission of one per cent.* upon the interest or increase of the fund, instead of five per cent. as erroneously allowed by the surrogate :

Held, 2d. That this fund being set apart, and the income given without any particular amount being specified, was chargeable with the *commission and taxes*—they were not payable out of the general estate :

Held, 3d. That although the executor, personally, worked out the *highway taxes*, they were nevertheless properly chargeable upon the fund :

Held, 4th. That the surrogate properly excused the executor from any personal liability in not keeping the interest upon the interest reinvested fully, where he stated in his account, filed "that he had tried to keep the fund together, with the accrued and accumulated interest, invested and reinvested as required by the will, and that he had not been able to do any better than is stated in the account;" it not being claimed that the executor used the funds in his own business, in trade, or that he made any particular profit from their use, nor was there anything to establish that he was guilty of any gross delinquency or violation of duty :

Held, 5th. That the executor was excused in depositing the funds in a *savings bank*, at an interest of five per cent. semi-annually, where they had been paid into his hands upon a bond and mortgage upon real estate, which had become due, where he showed that it was very difficult at that time to loan money on good real estate securities ; and especially as he put it in an institution where the rate of interest was quite as large as it would have been if deposited in the New York Life and Trust Company, where such investments are sanctioned by the courts :

Held, 6th. That the surrogate erred in directing the payment of the sum due to the plaintiff with interest at *five per cent.* There was no good reason why the amount should not draw interest at the usual legal rate from the time of the decree.

Albany General Term, September, 1865.

Before HOGBOOM, MILLER and INGALLS, Justices.

APPEAL from decree of surrogate, on June 23d, 1849. Peter Leversee made his last will and testament, and died July 10, 1839. By the will the testator directed his executors, at the expiration of four years after his decease, to invest out of his estate, upon safe and sufficient real estate securities, at the legal rate of interest, the sum of \$3,000, and to keep the same invested for the benefit of his granddaughter, Rachel S. Lansing, until she shall attain the age of twenty-one years, or until her death, applying the interest that might be received from said investment, or so much thereof as might be necessary toward the support and education of said Rachel ; and when she shall attain the age of twenty-one years, his executors are to pay her the sum of \$3,000, with the accrued or accumulated interest, except

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so far as the use thereof has been necessary as aforesaid, and by said executors deemed proper for the education and support of said Rachel; and, subject to the like necessity, his executors are directed to reinvest, safely and securely, the interest they may receive during such investment, for the like benefit of said Rachel. A similar provision is made for the benefit of Sarah Maria Witbeck. The testator bequeathes specific legacies to Peter L. Witbeck, Sarah Maria Witbeck, his granddaughter, Helena Lansing, and to his grandsons, Isaac N. and Peter Leversee Lansing.

The testator also directs the payment of the sum of \$100 annually, for the period of four years, to his daughter, Jane Ann.

The testator then devises to his daughter, Jane Ann, his farm in Watervliet, consisting of about one hundred and twenty acres, and also devises to Peter L. Witbeck one hundred and twenty acres; he also made the following devise: "All the rest and residue of my estate, real and personal, whereof I may die, seized or possessed, I hereby give, devise and bequeath (subject to the previous payment of the aforesaid legacies, and the investments aforesaid by my executors) unto my said daughter, Jane Ann, who is not, however, entitled to the possession of said rest and residue of my estate, or the rents, issues and profits accruing therefrom, until four years after my decease."

Rachel having arrived at the age of twenty-one years, an accounting was had before the surrogate of Albany county, all the parties interested were cited to appear including the residuary legatee.

The respondent, on his final accounting, claimed there was due Rachel \$5,447.26, and the surrogate decided there was due Rachel \$5,641.26, to wit, principal, \$3,000; increase \$3,093.26; taxes paid by respondent, \$297.44; and as respondent's commissions on the gross increase of the legacy, \$154.56.

Rachel S. Lansing, from this decree of the surrogate, appeals to this court.

The executor's account, filed with the surrogate, showed

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an investment of the sum of \$3,000, the amount of the legacy upon bond and mortgage, on the 10th day of July, 1853, at seven per cent. per annum, and an allowance of interest, and the interest upon the annual interest received up to the time of the accounting, with a deduction of taxes, highway taxes, and commissions at five per cent. upon the amounts received. It also showed that on the 29th day of October, 1862, the mortgage was paid up, and the executor not being able to reinvest upon real estate security, he deposited the same with a savings bank at five per cent. interest, compounded every six months, which interest with interest upon the same was credited on this account. Objections were made, that the charges for taxes and commissions were not proper items of charge against the legacy or its increase, to the charges of commissions at five per cent., to the deposit of the moneys in the savings bank at an interest of five per cent., to the charges for highway taxes, upon the ground that they had been retained by the executor as a compensation for his own services, he having performed the work himself. It was also claimed that the interest should be compounded from year to year.

A decree was made on the 15th of February, 1865, confirming the account, and bringing it down to December 23d, 1864, and directing payment to the appellant of \$5,641.26, with interest at five per cent. from that time.

Objection is made to the allowance of five per cent. instead of seven per cent. upon this amount.

A. LANSING, *for appellant.*

IRA SHAFER, *for respondents.*

By the court, MILLER, J. Several objections are made to the decree of the surrogate, which I will proceed to consider.

It is said that the surrogate erred in charging the appellant with commissions, taxes and expenses.

By the will of the testator the executors were to make the investment of the legacy bequeathed to Rachel S.

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Lansing, and to keep the same invested until she arrived at the age of twenty-one years, or until her death. The executors were to apply the interest, or so much as they deemed proper, toward her support and education, and upon her arriving at the age of twenty-one years, they were to pay her the legacy and the accumulated interest, except so far as the use thereof was necessary and deemed proper by said executors for the education and support of said Rachel.

The rest, residue and remainder of the estate is also disposed of, subject to the previous payment of the legacies and investments by the executors.

It is very evident from the will that there was no trust created in the hands of the executors, distinct and separate from their duties as such. The testator does not name them as trustees, and manifests no intention that they should act otherwise than as executors, with instruction to perform certain duties by virtue of their powers as executors. Without proper words to establish a trust it cannot be inferred. The fund in the hands of the executor for the benefit of Rachel S. Lansing was held by him in his character as an executor, and the trust created thereby was a part and portion of the duties imposed upon him as an executor and not distinctly and separately as a trustee. (*See Drake agt. Price*, 1 *Seld.* 430; *Valentine agt. Valentine*, 2 *Barb. Ch. R.* 430, 438 and 439; *Westerfield agt. Westerfield*, 1 *Barb.* 198.)

Acting then as executor and not as trustee in the investment and management of the legacy the executor was entitled to a commission of one per cent upon the interest or increase of the fund instead of five per cent. which was erroneously allowed him. This increase was not a separate and distinct receipt of money independent of what had been previously received, but merely an addition to the principal fund of the estate. This is expressly held in 1 *Seld.* 230 and 432 *Barb. Ch. R.*, before cited, and is well settled law. By statute the executor is only entitled to one per cent. for receiving and paying out sums over \$10,000 (*S. L. of 1863*, 608, § 8), and

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the estate here showed assets to the amount of fifteen thousand dollars.

The suggestion that the executor was entitled to full commissions upon the principle of annual rests, has no application to a case like this 1 *Seld.* 430, was similar in most of its leading features to the present case, and that disposes of the question the other way.

Whether this commission should be taken out of the fund itself or with the taxes and expenses be deducted from and chargeable on the general estate is another and different question, which must be determined by looking at the provisions of the will and ascertaining, so far as possible, what the testator really intended.

It appears that the legatee was to receive the legacy upon attaining her majority, and such interest as remained after paying for her support and education.

The amount was specific, and it was subject to this deduction alone, without any reference to commissions and taxes, and hence it is claimed that it cannot be complied with by the payment of anything less. It is true this is the only exception made, but it must be taken into consideration that this amount was specially set apart by itself as a fund for the benefit of the legatee, and as such it had a distinctive character. It was taken out of the estate for a specific purpose, and the legatee was to enjoy the interest, so far as it might be necessary, until she became of age.

It is quite possible that the residue of the estate may have been distributed before the time arrived when the legacy was due. Had such been the case, would the executor have been authorized to have retained any uncertain amount in his hands to meet the taxes and expenses?

This would scarcely have been considered as within the meaning and intention of the testator. He evidently meant to set apart this amount as a specific sum, the increase of which should be appropriated for the support and maintenance of his grandchild, and whatever remained to be reinvested, and principal and interest paid over at the proper time, and did not contemplate a resort to the estate generally to keep down

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the taxes and commissions. Where a fund is thus situated, and the party only entitled to the income, the authorities would appear to hold that it was subject to taxes and commissions. In 1 *Seld.*, 430, before cited, where the facts bear a striking similarity to the present case, it was conceded that a commission of only one per cent. was chargeable against the fund set apart.

In *Pinckney* agt. *Pinckney* (1 *Bradf.* 269), a testator gave to his wife the use and income of his real estate and the interest of a specified sum, and it was held, that the taxes and expenses were chargeable upon the fund and not upon the estate generally. The court say: "The bequest should bear its own burden; if the testator had intended these charges to be paid out of the general fund, he would have said so; and there is no presumption of law in favor of the doctrine contended for. The widow is not to be paid a certain fixed sum annually, nor are the executors to invest such an amount as will produce a clear net income, but she is to receive the income of a particular specified property and the interest of an investment of some thousand dollars, and the rest of the estate cannot be taxed so that she can obtain the gross instead of the net income."

Much of the reasoning here employed is applicable to the present case. The interest was to be paid as provided for certain purposes and at a specified period the principal. No provision is made that any charges upon the fund should be paid out of the general estate, and why should not the legacy be chargeable with these expenses?

In *Lawrence* agt. *Holden* (3 *Bradf.* 142), where a testator gave his wife by his will the use of a dwelling house for life, free and clear of all incumbrances, and in case she requested it, directed the property to be sold and the proceeds invested, and the interest, income and dividends applied to her use, it was held that the executors were not bound to pay the current taxes and assessments out of the testators general estate.

In *Booth* agt. *Ammerman* (4 *Bradf.* 129), the testator gave to his sister the interest upon fifteen hundred dollars, in

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case she should become a widow, during her widowhood payable annually, and it was held that taxes and commissions were chargeable upon the trust fund. The court say: "The taxes which the executors may be compelled to pay, and also the commissions on the interest payable annually to the legatee must come out of the interest, and are not chargeable upon the general estate."

The effect of the authorities cited clearly is, that a fund thus set apart when the income is given without any particular amount being specified is chargeable with commissions and taxes.

The objection made to the allowance for highway taxes is founded upon the ground that the executor, personally, worked out the taxes. The commissions for moneys received and paid out are in lieu of all personal services of the executor or administrator, and he will not be allowed any further compensation for his trouble or loss (*D. Sur.* 496).

Is the charge made in violation of this rule? We must assume that the road taxes were imposed upon the fund and that the executor was liable and bound to pay them. Instead of paying the money or licensing a person to do the work he performed the service personally.

He paid it in that way. The amount was fixed and settled and the estate legally obliged to pay it. It could make no difference whether paid in that way or by money. It is the same thing as if he had paid the money. He paid it by work instead of money, and it presents a case entirely different from one where services for which no compensation is fixed, are rendered for the benefit of an estate, and a charge made for such services. There an opportunity is furnished to make out charges and audit them, while here the estate must pay a certain sum. I think that a rendition of the service must be considered as a liquidation and payment of the tax for which the executor should be allowed.

It is said that the surrogate erred in excusing the executor from an investment of the interest upon the

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interest annually. The will required that the interest should be invested, and if it had been made to appear in any way that the executor has neglected to perform the duty enjoined upon him in this respect, and that the fund has suffered by reason of it, or that more could have been realized than was done, then he should be held liable for compound interest. In his account, filed with the surrogate, he states, "that he has tried to keep the fund, together with the accrued and accumulated interest, invested and reinvested as required by the will, and that he has not been able to do any better than is stated in the account." This account is rendered under oath and *prima facie* must be considered as mainly correct until assailed or impugned. It presents the fact, however, from which some adequate judgment may be formed, as to the propriety of his conduct in the disposition of the fund. Now it is somewhat manifest that it would not be a very easy matter at the expiration of each year, to reinvest the precise amount of compound interest received, so as to keep the fund in the process of constant accumulation, and hence to charge him with a strict accountability might inflict severe and unnecessary hardship.

The most which could be done under such circumstances would be to fix a certain amount which had accumulated, and charge interest upon that sum. This also would be a difficult matter to carry out practically, and in the absence of any evidence to contradict or dispute the statement of the executor to the effect that he has done the best he could, it would be unjust to charge him with compound interest annually. If there was any evidence to prove that the excuse offered was not a valid one, or any aspect of the case which indicated neglect, misconduct, or a want of good faith, there would be the strongest reason for holding him to the most rigid accountability. Those intrusted with the charge of trust funds under no circumstances should be permitted to use them for their own profit and pecuniary advantage, and whenever they thus violate their obligations the courts should see that they account strictly for their misconduct. They should require at their hands the

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greatest diligence and fidelity. An executor, administrator or trustee is not allowed to make any gain, profit or advantage from the use of the trust funds. If he negligently suffer the trust moneys to lie idle he is chargeable with simple interest.

If he convert the trust moneys to his own use and employ them in his business or trade he is chargeable with *compound interest* (*Scheifflien* agt. *Stewart*, 1 *Johns. Ch. R.* 620).

In *Ackerman* agt. *Emott*, (4 *Barb.* 626), STRONG, J., lays down the rule that compound interest is only allowed in cases of gross delinquency or of an intentional violation of duty. (See also *Utica Insurance Company* agt. *Lynch*, 11 *Pa.* 520; *Garness* agt. *Gardner*, 1 *Ed. Ch. R.* 128; *Willard's Eq. Juris.* 614; 2 *Kent. Com.* 230, 231; *B. & T. Law of Trusts, &c.* 594, 595.)

If we apply these principles to the case at bar, I think a case is not made out within the rule laid down. It is not claimed that the executor used the funds in his own business, in trade, or that he made any particular profit from their use, nor is there anything to establish that he was guilty of any gross delinquency or violation of duty. In fact, he presents a statement which if it can be relied upon will exonerate him from any charge of willful omission of duty or misfeasance.

While trustees are held to great strictness in the management of trust funds, the court will deal leniently with them, when it appears they have acted in good faith, and if no improper motive can be attributed to the trustee the court will excuse the apparent breach of trust, unless the negligence is very gross. (See *T. & B. Law of Trusts and Trustees* 599, and authorities there cited.)

As this case does not present features which indicate a departure from any settled rule of law, or bad faith on the part of the executor, I think that the objection is not available.

It is further urged that the surrogate erred in excusing the executor's deposit of funds in the savings bank at an interest of five per cent. payable semi-annually.

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By the will the executor was required to invest in real estate securities. It is not denied that it was difficult at the time when the money was paid into his hands to find securities of this character.

Where special directions are given they should be pursued if possible. If they cannot be followed then the executor should look out for such other securities as the court is known to have adopted and when it has authorized and sanctioned any particular fund as a safe investment, he would be justified in making the investment there.

In *Ackerman agt. Emott*, (4 Barb. 626), it was held that under the general power to make investments, the court would sanction any investment by executors and trustees in loans on real security, or in public stocks of the state or of the United States, or in the loans of the New York Life and Trust Company. It was said in this case that the law regarded the *certainty* of an income more than its *magnitude*. PARKER, V. C., who originally heard the case, and from whose decision an appeal was taken, remarks: "The court approves of a deposit in the New York Life and Trust Company until a safe investment can be made on bond and mortgage." The executor here being unable to invest upon real estate security was bound to dispose of the fund in the best manner which was practicable under the circumstances existing. He would have been justified in depositing it with the New York Life and Trust Company; and in placing it elsewhere than in such securities as were sanctioned by the court, he incurred the hazard of being made responsible in case of any loss. He put it in an institution where the rate of interest was quite as large as it would have been if deposited in the New York Life and Trust Company. It would have brought a larger income if invested in government securities, but as it turned out it would have been no safer than where it was.

It appears that the executor exercised a sound discretion in thus disposing of it, and as he has acted honestly, and as it does not appear that he could in any other way have disposed of the money so as to have it in his power to

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invest it in real estate securities, and as no such securities were offered, I think he was justified in the course which he pursued. He might, it is true, have made an application to the court for instructions, but he was under no obligations to incur such an expense and was not bound to do so.

A trustee or executor is required in making investments to conduct himself faithfully, and to exercise a sound discretion, and when he observes that prudence and intelligence which is demanded of a man in the management of his own affairs, not in reference to large gains, but the safety of the principal and its probable income, he should be sustained.

I think the surrogate erred in directing the payment of the sum due to the appellant with interest at five per cent. There is no good reason why the amount should not draw interest at the usual legal rate from the time of the decree, and in this respect his decree should be corrected.

With the views I have expressed it is not important to examine some other questions raised upon the argument.

The proceedings must be remitted to the surrogate, with directions to correct the decree in the particular named, with costs of appeal against the estate of the testator.

SUPREME COURT.

SALMON C. TURNER agt. ADELIA R. HONSINGER.

Where the defendant served an answer admitting two items in the complaint, and denied the balance of the complaint, and afterwards, on the same day, served an offer of judgment for \$1.01 more than the amount of the admitted items, which offer was not accepted, but the cause was put on the calendar for trial and referred, and on the trial the defendant amended her answer and set up two counter-claims, one for \$405.37, and the other for \$8.61, and on the trial the plaintiff defeated the counter-claim of \$405.37, and the defendant recovered upon the counter-claim of \$8.61, and interest thereon, which was deducted from the amount admitted by the answer, and the balance of \$87.37, reported as due the plaintiff March 22, 1866 :

Held, that the plaintiff had recovered "a more favorable judgment than the one offered," and was entitled to full costs under section 385 of the Code.

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Clinton Special Term, June 5, 1866.

Before BOCKES, J.

THIS action was brought to recover an amount alleged to be due on various items stated in the complaint.

The answer was served August 11, 1865, and admitted the defendant's liability upon two of those items, which amounted that day to \$93.99, and denied all the other allegations in the complaint. One hour after the service of the answer, the defendant served an offer that plaintiff might take judgment for \$95 and costs, making \$1.01 more than defendant had admitted by the answer to be due.

The plaintiff did not accept the offer, but noticed the cause for trial at October circuit, 1865, and the same was referred, and in January, 1866, after the trial had progressed two days, the defendant amended her answer, and inserted therein two counter-claims, one of \$405.37, and the other for \$8.61, and interest from November 20, 1863. On the trial the defendant failed to recover any part of the first counter-claim, but did recover the whole of the second. The referee reported due the plaintiff \$87.73, March 22, 1866, which is the balance of \$93.99 and interest, after deducting the amount of the second counter-claim.

On these facts the plaintiff moved the court for *full costs* on the ground that he had recovered "a more favorable judgment," under section 385 of the Code, than the defendant offered.

D. S. McMASTERS, *for motion,*

cited in favor of the motion 7 *How.* 324; 2 *Bosw.* 499; 1 *Duer*, 694; 10 *How.* 270; 15 *Id.* 420; 26 *Id.* 398; 8 *Id.* 240; 30 *Id.* 13; 18 *Abb.* 368.

BECKWITH & SONS, *opposed.*

The judge granted the motion, and ordered that the plaintiff be allowed "*full costs* in the action, and the clerk

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of Clinton county is hereby directed to adjust and allow plaintiff's costs, &c., on the usual notice, after the entry of this order, &c."

No written opinion was given.

The following NOTE furnished by one of the counsel in this case, gives his views of the practical working of this section of the Code :

NOTE.—The rights of parties under section 385, are yet involved in much doubt and uncertainty. Whether a plaintiff has recovered "*a more favorable judgment*" under that section than was offered, has been and will continue to be a difficult question to determine in consequence of the material facts of each case being different from any previously reported case. The offer has a double effect: *First*, it throws the costs of the future litigation upon the plaintiff, if he does not recover a more favorable judgment than was offered; and, *secondly*, to throw full costs upon the defendant if he does not offer enough. *Practically*, the defendant's attorney makes the offer a little in advance of the amount which he believes the plaintiff can and will recover in the action, and in case the plaintiff does not accept the offer, the future costs depend upon whether the recovery is more favorable than the offer.

In this case the answer was first served. It admitted \$93.99 due the plaintiff on two items named, and denied all the others. Next came the offer on the same day for \$95, just \$1.01 above the amount admitted to be due by the answer.

Had the litigation proceeded upon the complaint, answer and offer, as they then stood, the plaintiff must have paid the future costs to the defendant, because he recovered \$1.01 less than the amount offered, upon the whole complaint. But had the offer been accepted by the plaintiff, the defendant would have recovered two counter-claims against the plaintiff, and they would not have been extinguished by the acceptance of the offer, because not in the answer at that time. But on the trial the defendant inserted in the amended answer two counter-claims, and had the defendant recovered the full amount of both those counter-claims, the defendant would have been entitled to costs after the offer, the same as though the litigation had proceeded on the original pleadings. In both cases the plaintiff would have recovered upon his claims in the complaint \$1.01 less than the offer. The defendant in this case succeeded in establishing the second counter-claim of \$8.61, and the amount reported due the plaintiff was only \$87.73, a sum much less than the amount offered, which otherwise would have been \$93.99. Still the defendant pays full costs to the plaintiff, because the plaintiff defeated the other counter-claim of \$405.37. But suppose the plaintiff had defeated only \$2 of this last counter-claim? These \$2 added to the \$93.99, would exceed the amount of the offer, and apparently give the plaintiff a more favorable judgment than was offered, and entitle him to full costs.

But the report would have been in favor of the defendant for \$317.99. In such a state of the case, will the plaintiff be entitled to recover full costs against the defendant, and have the same deducted from the amount reported against him, or will the defendant enter judgment with full or partial costs? Such a case, and a variety of other cases under this section, will arise for adjudication.

The case of *Ruggles et al. agt. Fogg* (7 How. 324), decided by Judge HARRIS, is the leading case, and seems to have been recognized and followed in all subsequent cases under this section.

The rule to be extracted from that, and from this case and other cases, seems to be, "that where the amount recovered, and the amount extinguished of the

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SUPREME COURT.

IN THE MATTER OF THE PETITION OF MARGARET R. BULL FOR
THE SALE OF LOTS ON EIGHTEENTH STREET, &c.

A purchaser of real estate at a public sale will not be released by the court from his purchase upon the ground,

1st. That a party who it is alleged has an interest in the property was not made a party to the proceedings for the sale, where it is offered on the hearing of the application, to furnish a release of all the interest of such party in the premises.

2d. That certain heirs at law having, as alleged, an interest in the property under the will of the testator, had not been made parties to the proceedings for the sale, where it appeared from the will that the income of the property was given to M. (a daughter) for life, and after her death without issue, to go to his son J. in fee, and he having died before M., leaving a will disposing of his property to his minor children :

Held, that these minor children of J. could not be necessary parties to the proceedings for the sale, as they had no interest in the property ; J., their father, having no interest therein which he could dispose of by will until the death of M., who was then alive.

3d. That two only of the three executors had executed the conveyance, where it appeared that the three executors named in the will had qualified, but one of them soon afterwards left the United States, and was removed from the office of executor by the surrogate, but had since returned to the United States, and declined to unite in the conveyance :

Held, that where a trustee resigns or is discharged from his office, the remaining trustees are vested with the entire estate ; and the same rule would seem to apply to the removal of an executor by the surrogate. The power he obtains to execute the trust is given to him not by name but as executor, and when removed as executor his relation to the estate ceases.

But in this case, the sale of the property was not made by the authority contained in the will, but under and by virtue of the statute—acts of 1864 and 1865. The legislature had power to authorize the sale to be made by any officer of the court, or in such manner as the court should direct ; and also had power to direct who should execute the conveyance. This they did when they directed that the conveyance should be executed by the said trustees ; and that the notice be served on the two acting executors by name ; the other executor having been removed and having ceased to act long before the passage of either act.

counter-claims inserted in the answer after the offer made, together exceed the amount offered, the plaintiff is entitled to full costs."

But whether this rule will be applied to a recovery by the defendant, as in the case above stated, remains to be seen.

The law ought to be that when an answer is served after an offer made, or an answer is amended after an offer is made, the offer should be deemed to be withdrawn. With this amendment to the section, there will be little or no difficulty in determining whether the plaintiff in any given case has recovered a more favorable judgment than was offered, and the game now played for costs will be up.

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New York General Term, November, 1865.

Before INGRAHAM, P. J., LEONARD and BARNARD, Justices.

JOHN TONNELE on the 20th day of August, 1846, died seized of the premises in question leaving a last will and testament which was duly admitted to probate by the surrogate of New York.

By this will John Tonnele, after making some specific devises, gave and devised "all the rest and residue of his estate to his executors, thereafter named upon the several trusts thereafter mentioned." By said will the said John Tonnele, after the death of his wife, Rebecca, ordered and directed his executors and the survivor and survivors of them to pay over the income of the premises in question to the petitioner during her natural life, and after her death he gave the said premises to her issue, if she should leave any, and if the petitioner should die without issue the said John Tonnele gave and devised a portion of the premises in question to his son John, and the balance of the premises to his daughter Susan, now the wife of Valentine G. Hall. John Tonnele, Jr., the son of the testator, has since died, leaving him surviving the following children: Julia E. Wetmore, Laurent J. Tonnele, Laurencine T. Degan, Adelaide J. Mitchell, Margaret Langinetto, and Eloise Tonnele.

The testator then appointed John Tonnele, Jr., Valentine G. Hall, Francis E. Berger, William Penfold and George Hall his executors. Valentine G. Hall, Francis E. Berger and George Hall only qualified as such executors. In — Francis E. Berger having removed from the United States was removed by the surrogate of New York from his office as executor.

The legislature of the state of New York, by an act passed in 1864, and an amendment of the same passed in 1865, empowered the supreme court upon the petition of the petitioner herein, on the proof of a service of a copy of the petition, together with a notice of the time and place of its presentation, on certain persons therein named and upon the general guardian of such said persons as might be infants, to authorize a sale of the premises in question upon

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such terms as should be deemed most expedient for the parties in interest.

None of the persons upon whom the act required notice of the application to be given were infants except Eloise Tonnele, who was under twenty-one years of age, and had no father living, and had no testamentary guardian; nor had any guardian ever been appointed for her by the surrogate of any county, but she resided with her mother, who had the custody and control of the infant, and attended to her education and maintenance.

The said act and the amendments thereof provided that upon the confirmation of any sale made by the supreme court that the said trustees, viz: Valentine G. Hall, and George Hall and the petitioner and her husband should execute a conveyance of the premises sold.

Upon such petition such proceedings were had, that on the 14th day of June, 1865, an order was duly entered ordering a sale of the premises in question upon certain terms and conditions, and appointing John T. Hoffman referee to carry the order of the court into effect.

The said referee in pursuance of the directions contained in said order, on the the 18th day of July, 1865, sold a portion of the premises in question to John Anderson, and another portion to Catharine Bradley, both of which purchasers have assigned their bids to John Kerr, who now refuses to complete his purchase upon the ground stated in his petition herein.

NEWHOUSE & WHELP, *attorneys, and*

CHARLES H. VAN BRUNT, *counsel for petitioner, Margaret R. Bull.*

I. The children of John Tonnele, Jr., deceased, and Susan Hall, wife of Valentine G. Hall, have a contingent remainder in the premises in question.

(a) A vested remainder is defined by Fearno to be one that is so limited to a person in being and ascertained that it is capable of taking effect in possession or enjoyment

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in the certain determination of the particular estate, without requiring the concurrence of any collateral contingency.

(b) A contingent remainder on the other hand is one that is so limited as not to be capable of taking effect in possession or enjoyment on the certain determination of the particular estate without the concurrence of some collateral contingency (*Fearne on Remainders*, vol. 2, § 173, 174).

(c) The non-existence in a vested remainder and the existence in a contingent remainder of a contingency, irrespective of its own duration, on which the possession or enjoyment strictly depends, is that which constitutes the fundamental distinction between them. (*Fearne*, vol. 2, § 177.)

(d) A remainder is vested when it is certain of ultimately taking effect in possession or enjoyment if only it endures beyond the preceding estate (*Fearne*, vol. 2, § 182).

In the present case neither Susan Hall nor the children of John Tonnele become entitled to the enjoyment of any part of the premises in question upon the death of the petitioner, unless she die without issue, and it depends upon the happening of that contingency, viz: her dying without issue, whether Susan Hall or the children of John Tonnele, even if they survive the petitioner, will be entitled to any interest in the premises.

Thus under the common law Susan Hall and the children of John Tonnele would have a contingent remainder in the premises in question.

The Revised Statutes of this state define a remainder to be vested, when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate.

In the case of *Moore* agt. *Lyons* (25 Wend. p. 144), the chancellor defined a remainder to be vested when the particular estate is to determine by an event which must unavoidably happen by the effect of time. Provided nothing but the death of the remainder-man before the determina-

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tion of the particular estate will prevent such remainder from vesting in possession.

In the case of *Williamson* agt. *Field* (2 Sand. Ch. R. p. 552), the vice chancellor gives this definition: "A vested remainder is one by which a present interest passes to the party; though to be enjoyed in the future and by which the estate is fixed to remain to a determinate person, after the particular estate is spent." He has an immediate fixed right of future enjoyment.

II. The legislature as the sovereign had the power for good and sufficient reasons to authorize and direct the sale of the *cestuis que* trusts and of the person in esse, and of those not in esse at the time of the passage of the acts (*Leggett* agt. *Hunter*, 19 N. Y. R. p. 463).

(a) It authorizes a mere change of real estate into personalty. In the case of partition, if persons hold property as tenants in common, which cannot be divided amongst them, any one of them may compel a sale, and thus convert the realty into personalty.

III. It was not necessary for Francis E. Berger to unite in the conveyance.

(a) The act of the legislature and the act amendatory thereof empowered the supreme court to authorize a sale of the premises upon the petition of the petitioner herein, and upon proof of service of notice upon Valentine G. Hall and George Hall, executors of John Tonnele, deceased, and upon other persons therein named, and directed that upon the confirmation of the sale a conveyance or conveyances of the same should be executed by the said trustees, and the petitioner and her husband, and further provided that conveyances executed as aforesaid should be valid and effectual to vest in the purchaser, his, her or their heirs or assigns a fee simple absolute.

(b) Francis E. Berger had, prior to any of these proceedings, been removed from his office by competent authority, and in the act of the legislature is not mentioned as one of the executors or trustees of John Tonnele.

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(c) The surrogate has the power under the statute to remove an executor (3 *R. S.* 5th ed. p. 157).

At the time of his removal his duties as executor simply had not ceased. It was only as executors that either Valentine G. Hall, George Hall or Francis E. Berger had any power or control over the estate.

They held the real estate in trust by virtue of their office as executors, and if for any cause their office as executors ceased, being trustees *virtute officii*, their duties as trustees also terminated.

They were liable to account for the rents, income and profits of the real estate before the surrogate as executors, independent of the statute (*Stagg agt. Jackson*, 1 *Com. R.* p. 211).

In the present case the trusts and trust powers were conferred upon these persons in their character as executors, and in such a case the supreme court could not remove one of the persons from their office as trustee and allow that of executor to remain, or *vice versa*; and if the surrogate had the power to remove Mr. Berger as executor, his office of trustee no longer remained (*Matter of Wadsworth*, 2 *Barb. Ch. R.* p. 384).

IV. The service of the notice of motion and petition upon the mother of Eloise Tonnele as her guardian, was a compliance with the act of the legislature, and the court acquired jurisdiction by such service.

(a) There is no such office known to the statute as general guardian. The phrase has been somewhat loosely used in common practice to distinguish between a person who is appointed a guardian by the court to represent the interests of the infant in a particular action or proceeding, and a person who has the legal right to the custody and care of the infant and the general supervision of its interests.

(b) Under the Revised Statutes of this state, where an estate in lands shall become vested in an infant, the guardianship of such infant with the rights, duties and powers of a guardian in socage shall belong,

1st. To the father of the infant.

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2d. If there be no father to the mother.

Such a guardian has the right to the care, custody and control of the infant, and the right to the income and profits of the real estate, and could maintain ejectment in respect to the same (2 *Kent's Com.* p. 222).

In the present case Eloise Tonnele has a vested interest in real estate, and has no father, neither has she any testamentary guardian, nor has any guardian ever been appointed by the surrogate, consequently by the force of the statute above mentioned, her mother is her guardian, and as such guardian she has the charge, custody and maintenance of the infant, and has the right to the income of its real estate.

The mother as guardian having the general control of the infant and its interests, was the general guardian of the infant within the meaning of the statute, and the service upon her was regular.

V. If the court should decide to grant the motion of John Kerr, it should only direct the referee to repay the ten per cent. paid by the assignors of said Kerr.

(a) The referee has no fund out of which he can pay interest, nor out of which he could pay any of the expenses incurred by Mr. Kerr in the investigation of the title herein. The whole legal estate vested in the executors (3 *R. S.* p. 21 § 79).

He received the auction fees for the auctioneer, and they have been paid over by the referee to him, and if he was directed to pay the same, or any part thereof, it would have to be done out of his own fund.

VI. Mr. Justice SUTHERLAND having reconsidered his decision in respect to this application, and having transferred the matter to Mr. Justice INGRAHAM no new notice was necessary.

VII. The motion should be denied.

ROBINSON & SCRIBNER, *attorneys, and*
HAMILTON W. ROBINSON, *counsel for petitioner, John*
Kerr.

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I. The power of sale conferred by the act of the legislature (*Laws of 1864, chap. 303 as amended by chap. 233 of the Laws of 1865*), can only be carried into effect by a strict compliance with its provisions so as to convey the property of the infants and parties not yet in being.

The deed is a void execution of the power unless executed by all "*the trustees*," as well as by Mrs. Bull and Alfred R. Bull, her husband (*Schuyler agt. Marsh, 37 Barb. 350, and cases cited p. 356*).

Although service of the petition is only required to be made on Valentine G. Hall and George Hall as executors, yet the deed must be executed by "*the trustees*" (see *Laws of 1864 chap. 303, and Laws of 1865 chap. 233*).

The estate in the land is still held by Francis E. Berger as one of the trustees under the last will and testament of John Tonnele, Sen., and as joint tenant with Valentine G. and George Hall, the other trustees, during the life of Margaret R. Bull (formerly Tonnele). *Letters testamentary* were issued to all three.

Although Francis E. Berger was in 1860 removed by the surrogate of New York from his office as executor, he has never been removed by the supreme court from his office as trustee and still holds that office.

He could not act as trustee of an express trust in real estate under his nomination as executor without having first taken out letters testamentary (2 *R. S.* 71, § 15, 16.)

A sale of real estate by those who had taken out letters would be good, although the others named in the will and who had not qualified had not joined (*Sharp agt. Pratt, 15 Wend. 610; 2 R. S. 100 § 55; King agt. Donnelly, 5 Paige 46; Taylor agt. Morris, 1 Coms. 319; Matter of Wadsworth 2 Barb. ch. 381*), but all who qualify must join.

The surrogate had no authority to remove Mr. Berger from his office as trustee of the real estate, or divest him of any interest in or power over the land (1 *R. S.* 730 § 69, 70, 71, 72).

The *cestui que trust* would be interested in and a necessary party to any proceeding to remove the trustee. (*Shepherd*

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agt. *McIvers*, 4 *John. ch.* 136 ; *Diefendorf* agt. *Spraker*, 6 *Seld.* 246 ; *Roome* agt. *Phillips*, 27 *N. Y. R.* 357.) He may not be in a situation to be represented in the surrogate's court. He may be interested only in the reality, or be a non-resident and amenable only to the process of a court having common law jurisdiction.

The removal of a person as executor by the surrogate, and as trustee by the supreme court, is not co-relative or reciprocal in its operation. (*In the matter of Van Wyck*, 1 *Barb. ch.* 545 ; *Conklin* agt. *Edgerton*, 21 *Wend.* 436.)

II. The necessity for the execution of the deed by all the contingent remainder-men who are adults is evident from the case of *Powers* agt. *Berger*, (2 *Seld.* 358).

III. The motion should be granted and the purchaser discharged with payment of the ten per cent., and his expenses of examining the title to be paid out of the funds in the hands of the referee.

By the court, BARNARD, J. There is no question made but that the legislature had power to pass the acts of 1864 and 1865, under which this petition was presented to the court. The power has for many years been exercised in like cases, and is sustained by the highest authority (*Leggett* agt. *Hunter*, 19 *N. Y. R.* 463). *Berger* by reason of his removal from the state, was removed as executor by the surrogate of New York. He was trustee because he was an executor, and when he ceased to be executor he ceased to be trustee. But assuming that he was still a trustee, it was competent for the legislature to declare that a deed executed by two of the three trustees, should be sufficient to convey the entire estate. This the act does in terms. It provides for notice to be served on Valentine G. Hall and George Hall, as executors of the deceased John Tonnele, and provides that a conveyance by them shall be sufficient "to vest in the purchaser a fee simple absolute." (*Laws* 1864, p. 732 ; *Laws* 1865, p. 376.)

Eloise Tonnele, an heir of John Tonnele, is an infant. The act directed a copy of the petition to be served on her

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general guardian. This notice was served on her mother, her father being dead and she having no testamentary guardian, and no guardian having been appointed for her by the surrogate.

She resided with her mother, who had the custody and control of the said infant Eloise Tonnele, and attended to her education and maintenance. The mother is by statute the guardian in socage of the infant (*Chap. 1, title 1, part 2, article 1, R. S.*). This gave the mother "a right to the custody of the infant's land and body" (2 *Black. Com.* 88).

The service was properly made upon the mother, but this question cannot be made by the purchaser. The court decreed that the service was proper, and granted the sale. A review cannot be had except by a direct appeal. It cannot be questioned collaterally.

The order refusing to release the purchaser from his bid, should be affirmed with costs.

INGRAHAM, P. J. The property sought to be sold is part of the estate of John Tonnele, deceased, and this petition is on behalf of one of the parties interested under the will, for a sale of certain lots belonging to the estate, and such proceedings were had that a sale was ordered by this court. Under that order of sale lots eighty-seven, eighty-eight and eighty-nine, were sold to John Anderson, and lots ninety, ninety-one, ninety-two and ninety-three, to Catharine Bradley. Anderson and Bradley assigned their bids to John Kerr.

Kerr now moves to be released from his purchase, upon the ground that the title is defective for several reasons.

So far as any objection is made to the interest of Mrs. Hall, that was disposed of on the argument by the offer of a release on her part of any interest in the premises. On the supposition that such an instrument will be executed, I shall not examine that objection, leaving to the purchaser the right to renew his motion if the same is not executed.

The only questions which require examination are whether the children of John Tonnele, the son of the testator, are

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necessary parties? Whether Francis E. Berger, one of the executors, must unite in the conveyance to give it validity?

The will gave the income of these lots to Margaret for life, and after her death to her issue, and in case of her death without issue, lots eighty-four to eighty-eight were to go to his son John, and lots eighty-nine to ninety-three, to his daughter Susan, in fee.

The son John has died, leaving a will disposing of his property to minor children, and these children it is urged should be before the court on this application. I think not. John obtained no title to the premises, and could have no interest therein which he could dispose of by will until the death of Margaret without issue, and as she is still living, no interest could pass under his will to his children, and they would not necessarily be parties to this proceeding. They could take no interest under the will because the father had none that he could devise, and they are not entitled to any now as the heirs at law, because as such no estate could vest in them as the heirs of Margaret until her death. There was no ground for making them parties to this application.

The other question is, whether a good title can be given by the executors who are now acting. Three of the executors named in the will qualified, viz.: G. Hall, V. G. Hall and Francis E. Berger.

In 1860 Berger left the United States, and was removed from the office of executor by the surrogate. He has since however returned to the United States, but as I understand, declines to unite in the conveyance.

The statutes of 1864, amended by that of 1865, provide for this application, and authorize the sale of the property. That statute refers to the property as held in trust by the executors of John Tonnelo under the will, and authorizes the court to direct a conveyance of the same to be executed by the *said trustees* and others. The fourth section provides that all such conveyances made as aforesaid, &c., if executed by the trustees as aforesaid, or such persons as may be appointed in his or their place, &c., shall be valid and effectual.

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The validity of these statutes and the power of the court thus to dispose of the interest of infants and of persons not *in esse* has been settled by several cases in the court of appeals (*Leggett* agt. *Hunter*, 19 *N. Y. R.* 445), and the right of the executors who qualify to execute the trusts to the exclusion of others who do not qualify is also settled by the same case.

We are brought down then to the sole question whether an executor who has been removed by the surrogate from his office as executor is a necessary party to land to be sold under an act of the legislature, which authorizes a sale to be made by the trustees who held the property under the will at the time of the act.

There can be no doubt if this is a trust but that this court could appoint another trustee in the place of Berger on a proper application (*Roome* agt. *Phillips*, 27 *N. Y. R.* pp. 358, 363).

The will of Tonnele, Sen., gave the executors no authority to sell any of the property excepting such parts of the real estate as he had previously in his will directed to be sold, and no power of sale was given to the executors in regard to any of these lots.

But by a previous provision in the will the testator devised all his estate except some specific legacies and devises to his executors upon the trusts thereafter named. Under this provision the executors who took upon themselves the execution of the will became vested with the title and might sell the real estate (3 *R. S.* 5th ed. p. 197, § 66).

If at any time an executor becomes incompetent to serve he may be superseded by the surrogate, and the remaining executors would have thereafter the sole administration under the will (3 *R. S.* 5th ed. p. 157).

The revised statutes as to trusts empowers this court to remove trustees and to accept their resignations, and while the court is authorized so to do still it is not obligatory to appoint a new trustee, but may leave the other trustees to execute the trusts or appoint another as may be thought best (3 *R. S.* 5th ed. 22). After the executor had been removed if

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such a proceeding had taken place here here there would have been no doubt as to the remaining trustees and executors having full authority to execute the trusts. The court could not remove the executor as such, and the removal of the trustee merely while he was acting as executor might not be sufficient to divest him of the estate which was devised to him as executor (2 *Barb. Ch. R.* 365). A contrary view seems to have been taken by BROWN, J., in the matter of *Crossman* (20 *How. P. R.* p. 350), where a trustee and executor under a will applied to the court to be released from his trusts. In that case the judge says, "the bequest of the will is to all the executors. The effect is to vest the legal title in all the executors, who qualified with the right of survivorship, should either die, become incapable of acting or be removed by the order of the court having jurisdiction;" and again when one trustee resigns or is discharged from his office the remaining trustees are vested with the entire estate.

I am inclined to think the same rule applies to the removal of the executor by the surrogate. His power to act ceases in regard to the will and the administration of the estate. The power he obtains to execute the trust is given to him not by name but as executor, and when removed as executor his relation to the estate ceases.

But I do not think this question necessarily involved in this case. This is not the sale of property authorized by the will and in pursuance of authority conferred thereby, but under and by virtue of the statute. The legislature had power to authorize the sale to be made by any officer of the court or in such manner as the court should direct. So also they had power to direct who should execute the conveyance in the statute. This they did do, when they directed that the conveyance should be executed by the said trustees. We must then see who are the said trustees named in the act. The statute directs notice to be served on Valentine G. Hall and George Hall as executors of John Tonnele, deceased, and states the lands are held in trust by the executors of said Tonnele and then directs the conveyance

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to be executed by the said trustees. The intent of these provisions is that the conveyance shall be executed by the then acting executors of Tonnele. Berger had been removed and ceased to be an executor long before the passage of either act. It names the other two executors as the persons upon whom notice is to be served as the only acting executors entitled thereto, it designated the executors (then being such) as holding the land in trust and then directs them the persons so holding the estate to execute the deed.

My conclusion is that both from the removal of Berger as executor before the passage of the statutes and from the provisions of those statutes in which the other executors also are named as such and as holding the trust, that the intent of the legislature was that the deeds should be executed by the acting executors, Valentine and George Hall, and that it is not necessary that Berger should join in the conveyance.

The motion to relieve the purchaser from his purchase is therefore denied.

NOTE.—Subsequent to this decision Francis E. Berger died, and the adult remainder-men all uniting in the conveyance, Mr. Kerr accepted the title and took his deed.

SUPREME COURT.

JACOB H. MARTIN agt. JANE HOUGHTON.

In a justice's court, if inferences are to be indulged they must be in support of and not against its proceedings; and where a party seeks to reverse the judgment he must show affirmatively that *error* has been committed, and that he has been prejudiced thereby.

It is well settled that a party may litigate a question of *license* in a justice's court.

To constitute a *license* which amounts to a defense to an action of trespass, there must be a permission to enter upon the premises, which may be express or implied from circumstances; and it has been held that *familiar intimacy* between families may be evidence from which a general license for such purpose may be presumed.

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Where the defendant for thirty years had been in the habit of frequently visiting the plaintiff's family—the families of both parties being upon intimate terms—*held*, that the jury were justified in finding an implied license to the defendant to visit the plaintiff's family. And the evidence justified the jury in finding that the defendant did not enter upon the premises in violation of the permission of the plaintiff *after she was forbidden by him*.

Albany General Term, September 1865.

Before HOGEBOM, MILLER and INGALLS, Justices.

THIS is an appeal from the judgment of the county court of Albany county reversing the judgment of the justice's court in the above action. The plaintiff complained against the defendant in trespass for crossing his premises after the *defendant was forbidden*.

The defendant interposed an answer, 1st. General denial; 2d. License from the plaintiff to cross; 3d. That the public had a right to cross the path. The action was tried by a jury who rendered a verdict in favor of the defendant.

The additional facts appear in the opinion of the court.

J. H. CLUTE, *for appellant*.

IRA SHAFER, *for respondent*.

By the court, INGALLS, J. It appears from the evidence of the plaintiff that the defendant had been in the habit of coming upon the premises of the plaintiff for a series of years, and within the two years next prior to the trial, passed through the door yard, sometimes upon one side of the house and at other times upon the other side. There was a path some part of the time upon which the defendant traveled. The plaintiff testified that the defendant came to his house a number of times, but did not know and could not testify whether he had sent for her. That he forbid her crossing his place at different times, and she said she would go and did go. *That he told defendant she should not cross the path but might cross along the stone wall.* That she afterwards *passed around the house*, and he then told her she should not cross his place at all. The defendant testified in substance that she had lived at her brother's since she was born; and that there had been a path from her brother's to the

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plaintiff's which she had traveled for thirty years. That the plaintiff forbid her going *on the path*, but gave her permission to go along the *stone wall*, and that she was going along the wall when the boy told her to go off the rye. That she had traveled that path in going to plaintiff's when his mother was sick. *That the families had been on intimate terms.* That she had seen the path ploughed up and a furrow ploughed for a path. I think from all the evidence the jury were justified in finding that no trespass was committed by the defendant upon the premises of the plaintiff after she was forbidden to enter thereon. The plaintiff testified that the defendant had been in the habit of visiting his house and would not swear that such visits were not by invitation. He testified that he told defendant she should not cross the path, *but might cross along the stone wall.*

There is nothing in the evidence to *show where the stone wall was located*, or that in going around the house she did not go along the wall. The evidence does not show at what period, after she was forbidden to cross the premises, she crossed the same, nor but that such crossing was along the stone wall. It is quite apparent that the families had been on friendly terms, and the defendant had been a welcome visitor at the plaintiff's house, and for a period of thirty years had been accustomed to travel upon the path spoken of.

It can hardly be inferred from the evidence, that the plaintiff at the time he forbid the defendant crossing upon the path, and at the same time gave her permission to travel along the wall, supposed the defendant guilty of trespass for which he designed to hold her accountable. The jury were also justified, from the evidence, in finding that the defendant did not enter upon the premises in violation of the permission of the plaintiff *after she was forbidden.*

If inferences are to be indulged they must be in support of, and not against proceedings in the justice's court, and where a party seeks to reverse a judgment he must show affirmatively that error has been committed, and that he has been prejudiced thereby. The defendant interposed one defense.

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that the entry upon the premises was by the license of the plaintiff. To constitute a license which amounts to a defense to an action of trespass, there must be a permission to enter upon the premises, which may be express, or implied from circumstances, and it has been held that familiar intimacy between families may be evidence from which a general license for such purpose may be presumed. (*Adams agt. Freeman*, 12 *Johns. R.* 402; *Lyons agt. Blakeman*, 22 *Barb.* 336; *Haight agt. Badgley*, 15 *Barb.* 502; *Pierpont agt. Barnard* 2 *Seld.* 279.)

In the last case the question of license is fully considered. Certainly where a party has been for years in the habit of visiting the house of another without objection, a license will be implied. Any other rule would be unreasonable and oppressive. In this case the defendant, for thirty years, had exercised that privilege, the families being upon intimate terms, and upon this ground alone the jury would, in my judgment, have been justified in finding an implied license. The defendant's case, however, does not rest there; both plaintiff and defendant testify to an express permission to the defendant to pass along the stone wall, and the evidence does not show that the defendant entered the premises after that permission was revoked, nor that the defendant went elsewhere than along the wall after the permission was given.

I do not think a fatal error was committed in allowing the witnesses to testify in regard to the length of time the path had been there. That evidence was pertinent upon the question of license to ascertain how long the defendant had been in the habit of visiting the plaintiff's house, and by what way she went, with a view to show how marked and notorious had been the exercise of the privilege, as all these circumstances had a tendency to characterize the transaction, and were properly considered in determining the nature and extent of the permission relied upon to establish the license. It did not by any means follow that those facts bore necessarily upon a question of title.

Indeed the evidence does not show that the defendant

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attempted to assert any title or absolute right to enter upon the premises. On the contrary, when the plaintiff forbid the use of the path, the defendant, by the permission of the plaintiff, went along the wall.

No principle is better settled than that a party may litigate a question of license in justice's court. (*Doolittle agt. Eddy*, 7 Barb. 75; *ex parte Coburn*, 1 Cowen 568; 3 *Kent's Com.* p. 452.) The author says: "License is an authority to do a particular act or series of acts upon another's land without possessing any estate therein. It is founded on personal confidence, and is not assignable nor within the statute of frauds." (See also *Pierpont agt. Barnard*, 2 Seld. 279).

In reviewing proceedings of the justice's court great liberality is to be exercised, and a judgment is not to be reversed for a testimonial error which does not affect the merits. (*Borst agt. Smith*, 5 Barb. 283; *Spencer agt. S. & W. R. R.* 12 Barb. 382.)

I am of opinion that the defendant established a license to enter upon the plaintiff's premises, which constituted a defense to the action, and that no error was committed by the justice in admitting evidence which should reverse the judgment of the justice's court. The judgment of the county court must be reversed, and the judgment of the justice affirmed with costs.

SUPREME COURT

BREESE & MUMFORD agt. THE UNITED STATES TELEGRAPH COMPANY.

Where a *telegraph company* furnishes printed headings for the transmission of messages, containing certain terms and conditions upon which such messages will be sent, and an agreement that the same shall become binding upon both parties when signed by the person sending the message; the person who writes his message under such a heading and signs and delivers it accepts such printed proposition, and it thereupon becomes an agreement binding upon the company only according to its terms and conditions.

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The person who signs and delivers such message is *estopped* from denying the agreement which he has signed, by alleging that he never read it. It is gross carelessness and negligence not to read such conditions and agreement before signing and delivering the message.

A person who signs such a paper must know that he signs it for some purpose, and when he gives it to the company must understand that it is to regulate the rights which it explains.

The peculiar and stringent rules by which *common carriers* are controlled and regulated can have very little just and proper application to *telegraph companies*. (*This seems to be adverse to the general tenor of the opinion in De Rutte agt. N. Y. Telegraph Co. 30 How. 430.*)

Even if a telegraph company is held to be an ordinary common carrier, it has the right to limit its liability by *express contract*. (*This agrees with De Rutte agt. N. Y. Telegraph Co. supra, and is undoubtedly well settled law. If this doctrine is well settled, it would seem also that it settles the question of the similarity of the rules which govern each carrier.*)

Where the plaintiffs delivered to the defendant for transmission from Palmyra, N. Y., to the city of New York, a message written under the general printed proposition and agreement of the defendants, directing the purchase of \$700, in gold, without requiring a repetition of the message, and when delivered to the plaintiffs' correspondent in New York it read \$7,000, in gold, instead of \$700: *Held*, that the plaintiff could not recover for the loss he sustained.

Seventh District, Monroe General Term, March, 1866.

Before WELLES, E. DARWIN SMITH and JOHNSON, Justices.

THIS was a controversy without action, submitted under section 372 of the Code, on the following facts:

On the 16th of March, 1865, George W. Cuyler, President of the First National Bank of Palmyra, acting for the plaintiffs, presented to the defendant, a corporation duly incorporated, and engaged in the business of transmitting messages and dispatches by electric telegraph for hire, over its line of wires, extending from the city of New York northwardly and westwardly, at its office in Palmyra, a certain dispatch written upon the ordinary blank of defendant, and requested the same to be transmitted to the parties to whom the same was addressed, and paid for such transmission the fee charged by defendant, but did not pay for, nor request to have the same repeated. The blank and message thereon written were as follows:

No. ——. To all points in the United States and British Provinces. Reg'd.

UNITED STATES TELEGRAPH COMPANY.

E. C. Fellows, Gen'l Supt., Syracuse, N. Y.

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W. H. Kirtland, Ass't Supt., Rochester, N. Y.

N. Randall, President, Syracuse, N. Y.

S. C. Hay, Secretary, N. Y.

In order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated by being sent back from the station to which it is directed to the station from which it is sent, and compared with the original message. Half the tariff price will be charged for thus repeating and comparing. And it is hereby agreed, between the signer or signers of this message and this company, that this company shall not be held responsible for errors or delays in the transmission or delivery of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made and paid for at the time of sending the message and the amount of risk specified on this agreement, and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of same beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified on this agreement at the time; nor shall this company be held liable for errors in ciphers, or obscure messages; nor for any error or neglect by any other company over whose lines this message may be sent to reach its destination; and this company is hereby made the agent of the signer of this message to forward it over the lines of other companies when necessary. No agent or employee is authorized or allowed to vary the terms of this agreement or make any other or verbal agreement, and no one but the superintendent is authorized to make a special agreement for insurance. This agreement shall apply through the whole course of this message on all lines by which it may be transmitted.

“PALMYRA, March 16, 1865.

“Send the following message, subject to the above conditions and agreement:

“To Cammann & Co., No. 56 Wall street, New York:

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"Buy us seven (\$700) hundred dollars in gold.

"GEO. W. CUYLER, *President*.

"No. 2. Please write your address under your signature."

Cuyler had on hand at his office a lot of these blanks, which the defendant had left there to secure business, and took the blank in question from amongst the others and wrote the dispatch upon it. But neither Cuyler nor the plaintiffs had ever read the printed portion of said blanks. The message thus delivered was duly transmitted from the office at Palmyra, as written; but by some error of some of defendant's operators working between Palmyra and New York, the precise cause of which is unknown, it was received in New York and sent and delivered to Cammann & Co., in the following form: "To Cammann & Co., No. 56 Wall street, New York. Buy us seven thousand dollars in gold. Geo. W. Cuyler, President."

In consequence of the receipt of this message, Cammann & Co. immediately, on the same day, purchased on account of the plaintiffs \$7,000 in gold coin, and paid for the same the then market price of \$1.71 in legal tender notes for each dollar in gold. As soon as possible after the discovery of the error, the plaintiffs notified defendant of the same, and of the purchase, and tendered to the defendant the gold so purchased, at the price which had been paid, and gave notice that unless defendant elected to accept said gold at the price paid, the same would be sold at the public market for the highest price and defendant held liable for the loss. Defendant refused the tender, and the gold was accordingly sold at the best market price, which was \$1.51 $\frac{1}{4}$ in legal tender notes, by which a loss was sustained of \$1,244.25.

The plaintiffs seek to recover the amount of this loss, with interest.

CHARLES McLOUTH, *for plaintiffs*.

G. P. LOWREY, FRANSIOLI & SOREN, *for defendant*.

By the court, JOHNSON, J. It must be held, I think, that the printed heading to the paper on which the message

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delivered to the defendant for transmission was written, was, under the circumstances, something more than a mere notice to the plaintiffs' assignor, by whom such message was written, signed and delivered. Before the message was written under it, and signed and delivered to the defendant, it was a general proposition to all persons desiring to send messages by the defendant's peculiar means of transmission or conveyance of the terms and conditions upon which such messages would be sent, and the defendant become liable in case of error or accident in the transmission or conveyance. By writing the message under it, and signing and delivering the same for transmission, the party accepted the proposition and it became an agreement, binding upon the defendant only according to the terms and conditions specified in its proposition. That such is the legal effect of the agreement under which the message in this case was received for transmission by the defendant, seems to me extremely clear. Under the date of the message, and the name of the place from which it was sent, was printed in large clear type: "Send the following message, subject to the above conditions and agreement." Directly under this the message was written and signed by the plaintiffs' assignor. There is no pretence that the "conditions and agreement" thus referred to, were not plainly printed, or that there was the least difficulty in reading and understanding the terms proposed by the defendant. There they stood, in clear, plain print. First, a general statement, that "in order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated by being sent back from the station to which it is directed to the station from which it was sent, and compared with the original message." Following this list is the tariff or rate charged for such repetition and comparison, as follows: "Half the tariff price will be charged for thus repeating and comparing." Then follow the terms and conditions in this language: "And it is hereby agreed between the signer or signers of this message and this company, that this company shall not be held responsible for errors or delays in the transmission

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or delivery of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made and paid for at the time of sending the message, and the amount of risk specified on this agreement, and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of the same beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified on this agreement at the time." Here is no ambiguity whatever, but on the contrary, the language is well chosen, and the meaning and import perfectly clear and obvious to the most indifferent or careless reader. The price for transmission only was paid. There was no request to have the message repeated, and nothing was paid or offered therefor, and no insurance. The defendant is therefore exempt from all liability for the mistake or error complained of, by the express terms of the agreement.

It is stated, in the case made, that neither the person who signed the message nor the plaintiffs ever read the printed "conditions and agreement" thus subscribed. But it does not follow from this, by any means, that they are not bound by the conditions. They might and should have been read. It was very gross carelessness and negligence not to read them before signing and delivering the message. No notice was given to the agents of the defendant that the conditions and agreement to which the author and signer of the message had in terms agreed the same should be subject, he had in fact neglected to read, and inform himself as to their import. The presumption, in the absence of any notice, was that he had read and understood the proposition he had thus accepted; and the defendant's agents had the right to take it for granted that he had, and will be presumed to have done so, and to have sent in good faith the message upon the terms thus proposed and apparently accepted. The plaintiffs should not now be permitted to allege that their assignor either willfully shut his eyes and refused to see what was so plainly before him, or that he negligently omitted to use them for that purpose. To allow them now

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to do this, would operate as a fraud upon the defendant. It would enable one party, through his own gross negligence and inattention, to create a liability against another in his own favor, where none was bargained for, or would have been, and which was expressly stipulated against. The principle of *estoppel in pais* applies in full force against the plaintiffs' claim. Their assignor, by his conduct, led the agents of the defendant to suppose and believe that he had agreed to the defendant's propositions, and they cannot now gainsay the apparent agreement.

In *Lewis* agt. *The Great Western Railway Company* (5 H. & N. 867), which was a case where the person delivering goods to a carrier filled up and signed a receiving note under a printed head of "conditions," under which were certain printed conditions, and which the party afterwards, in an action for the loss of the goods, claimed not to have read, Baron BRAMWEL said: "It would be absurd to say that the document which is partly in writing and partly in print, and which was filled up, signed and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this, must know that he signs it for some purpose, and when he gives it to the company, must understand that it is to regulate the rights which it explains."

I cannot refrain from observing here, that the business in which the defendant is engaged, of transmitting ideas only, from one point to another by means of electricity operating upon an extended and insulated wire, and giving them expression at the remote point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place, by common carriers, that the peculiar and stringent rules, by which the latter is controlled and regulated, can have very little just and proper application to the former; and all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities

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will, in my judgment, sooner or later, have to be abandoned, as clumsy and indiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and at best but a loose or mere fanciful resemblance. The bearer of written or printed documents and messages, from one to another, if such was his business or employment, might very properly be called and held a common carrier, while it would be little short of an absurdity to give that designation or character to the bearer of mere verbal messages delivered to him by mere signs or speech, to be communicated in like manner. The former would have something which is or might be the subject of property, capable of being lost, stolen and wrongfully appropriated; while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation, even by the "king's enemies." But even if the defendant is held to be an ordinary common carrier, it had the right to limit its liability by express contract, as is now well settled. (*Bissell* agt. *New York Central Railroad Company*, 25 N. Y. 442; *Dorr* agt. *N. J. Steam Navigation Company*, 1 Kern. 485.)

In *MacAndrew* agt. *The Electric Telegraph Company* (17 Com. B. 3; 84 E. C. L. R.), it was held that a mere regulation of the corporation, similar to the one here in question, was a reasonable regulation under the act 16 and 17 Victoria, and shielded the corporation from liability for the mistake of sending the message to Southampton instead of Hull; and so in *Camp* agt. *The Western Union Telegraph Company* (1 Metcalfe, Ky. 164), it was held that a printed notice similar to the conditions here, not in the form of an agreement, was a reasonable regulation on behalf of the company, and binding upon the person delivering the message to be transmitted. Our statute providing "for the incorporation and regulation of telegraph companies" (*Sess. Laws of 1848*, chap. 265, §11), makes it the duty of the owner of any telegraph line doing business within this state, to receive dispatches, and on payment of their usual charges for transmitting dispatches, "as established by the rules and regula-

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tions of such telegraph line, to transmit the same with impartiality and good faith," under a certain prescribed penalty. Thus the statute, it will be seen, recognizes the right of the owners of these lines of communication, to "establish rules and regulations" for the transmission of communications, delivered to be forwarded, in nearly the same terms as the act of 16 and 17 Victoria. The legislature obviously never intended that these corporations, or persons engaged in this novel, interesting and extraordinary business, should be placed upon the same footing in respect to liability with ordinary carriers of goods.

There is no question here of gross negligence, against which the defendant could not, as carrier even, shield himself by contract. The case states that the message was duly transmitted from the office at Palmyra, as written and delivered, "but by error of some of defendant's operators working between Palmyra and New York, the precise cause of which is unknown," it was received in New York and delivered as an order to purchase \$7,000 in gold instead of \$700, according to the message delivered and duly transmitted at Palmyra. In view of the nature of this business, and of the peculiarly delicate and subtle agencies and forces employed in carrying it on, it is impossible for the court to say, from the statement, that the error complained of was the result of any negligence or inattention whatever on the part of the agents employed by the defendant. For aught we can see it may have been produced by causes over which no person had any control. And these considerations show most forcibly the importance and necessity of allowing those carrying on this business the right to make rules and regulations and contracts, limiting and controlling, to a reasonable extent, the grounds and measure of their liability.

For the foregoing reasons, I am of the opinion that the facts stated in the case made do not entitle the plaintiffs to any recovery. The defendant must, therefore, have judgment for its costs.

Judgment accordingly.

Kelty agt. Yerby.

NEW YORK COMMON PLEAS.

KELTY and others' agt. YERBY.

A notice served upon a judgment debtor to appear before a referee to answer in supplementary proceedings, which omits to state the place at which he is to attend, is *fatally defective*.

Special Term, May, 1866.

Before Hon. A. CARDOZO, Judge.

THIS was a motion calling upon the defendant, the judgment debtor, to show cause why he should not be punished for his misconduct in disobeying the order served upon him "by failing to appear before R. J. Cumming, Esq., the referee, at the time and place in said order required," as for a contempt of said court.

It was admitted that the defendant had been served with a copy of the order, and that the time at which he was to attend before the referee was properly inserted, but no place was mentioned at which he was to attend; and this, it was contended, was fatal to the motion.

The plaintiff's counsel then argued that on the day mentioned in the order, in consequence of the defendant not appearing, the referee adjourned the meeting to a future day, and that the defendant was informed thereof, and of the place at which he was to attend; and that, therefore, he could not be prejudiced by the omission of the place in the order.

It was held by the court that the order itself being bad, for the reason assigned, the giving the notice could not remedy the defect.

In fact, there being no place stated in the order, there could be no meeting; and there being no meeting, it could not be adjourned.

The court denied the motion.

THOMAS G. RITCH, *counsel for plaintiff.*

THOMAS BISGOOD, *counsel for defendant.*

Fleming agt. Cherry.

JUSTICES' COURT.

THOMAS FLEMING, landlord agt. A. B. CHERRY, tenant, and
JANE SAYERS, sub-tenant.

New York District Court, Third District.

Hon. WILLIAM E. SMITH, JR., Justice.

THIS was a summary proceeding under the statute before the justice and a jury, to remove the tenant and sub-tenant for holding over after the expiration of the term. Jane Sayers, the sub-tenant, occupied the premises which are located at No. 9 Carmine street, as a hardware and stove store, under a lease from the tenant, which expired the 1st day of May, and she put in a counter affidavit setting forth, that she retained possession of the premises under and by virtue of a lease from Thomas Fleming, the landlord, for one year, from the 1st day of May, 1866, at the rent of \$1,000 per annum. It appearing upon the trial that the lease was not in writing, the Court refused to admit evidence to prove such agreement, holding that since the act of congress directing that a revenue stamp should be affixed to leases and contracts, all verbal leases and contracts were necessarily void, and directed the jury to find a verdict in favor of the landlord.

Mr. PRENTICE, *for landlord.*

CULVER, CARPENTER & DE CAMP, *for tenant.*

ERRATA.

In the matter of Adrian Janes, 30 How. Pr. Rep., 446, page 449, the word "an" is left out in line seven from top of the page, between the words "of" and "affidavit." Page 449, in line three from the bottom of the page, the word "the," before person, should have been "said." Page 450, in line seventeen from the top of the page, the word "found" should have been "founded." Page 453, line fourteen from the bottom, the word "require" should have been "obtain." Page 452, line twelve from top, the words "Ch. Pr." should have been "Cr. Tr.," Page 451, line four from the bottom, the word "provisions" should have been "provision."

We hope that hereafter, under our new arrangements for printing, such errors as the above, or any material errors in this work will be avoided. REP.

Witbeck agt. Schuyler.

SUPREME COURT.

JAMES V. H. WITBECK agt. SAMUEL SCHUYLER and BENJAMIN AKIN.

A delivery of a trunk of clothing to the *captain* of the defendants' boat, renders the defendants, as common carriers, liable for its loss, although the captain was not the *general agent* of the defendants for receiving freight, &c., for transportation. The captain was acting within the scope of the *apparent authority* of agent, which the principals allowed him to assume.

Albany General Term, September, 1865.

Before HOGBOOM, MILLER and INGALLS, Justices.

THIS is an appeal from a judgment, entered upon the report of a referee in favor of the plaintiff, for \$217.84.

The action is brought by the plaintiff against the defendants, as common carriers, to recover the value of a quantity of clothing taken from a trunk of the plaintiff while upon the defendants' boat, on a passage from Albany to New York.

The referee finds, in substance, that the boat was run by the defendants for the transportation of freight, &c., from Albany to New York. That the trunk, with its contents, was placed upon said boat, for transportation to New York, and delivered to the defendants at Albany, by delivering the same to Henry Acker, the captain of the boat, who received the same. That the defendants kept an agent at Albany, whose business it was to make contracts for the receipt and delivery of freight, and other agents to tally freight and attend to the delivery thereof.

That the duty of the captain was to navigate the vessel, and nothing else. That the plaintiff, on several previous occasions, sent articles to New York upon the boat, and generally made the arrangement for the transportation with Captain Acker, and paid the charges for the articles to the defendants.

That the plaintiff had no knowledge or notice that the captain's duties were confined to navigating the boat. That on

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the arrival of the boat in New York, the trunk was found to have been broken open and its contents, to the value of \$60, taken therefrom. The plaintiff offered to pay the charges for transportation, as agreed with the captain, which was refused. The referee reported in favor of the plaintiff, and a judgment was accordingly entered for \$217.84, and the defendants appeal therefrom.

IRA SHAFER, *for appellants.*

C. B. COCHRANE, *for respondent.*

By the Court, INGALLS, J. The liability of the defendants is resisted on the sole ground, that the trunk was not delivered to the agent of the defendants, authorized to receive the same. That the delivery to the captain, was not a delivery to the defendants, and, therefore, they were not liable. The referee finds, that the only duty of the captain was to navigate the boat, and other agents were appointed to receive and deliver freight, and receive the pay therefor.

It does not appear that either the plaintiff or his father, knew of that arrangement, nor that they had any knowledge or notice, that the captain was not authorized to receive the trunk. *Witbeck had, on several occasions, sent articles by the captain, and paid the defendants therefor.* The captain was in attendance upon the boat, assumed to receive the articles for transportation, and did not notify the plaintiff or his father, that he was not authorized to receive the same. From these facts it would seem, that it might be implied, that the captain was authorized to receive the trunk, and the defendants thereby rendered liable for the loss.

In *Bridenbecker* agt. *Lowel* (32 Barb. 18), ALLEN, J., remarks: "A general agency is, therefore, constituted, not by the authority which the agent actually receives from his principal, but that which the latter allows the agent to assume." (*Dunning* agt. *Roberts*, 35 Barb. 467; *Dows* agt. *Greene*, 16 Barb. 77; *Paley on Agency*, p. 296.) "To charge a carrier with the receipt of goods to be conveyed, it is suffi-

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cient to show a delivery to his servant usually employed in that business."

This is just, as the principal has the selection and control of his agent, and should be responsible for his acts performed within the scope of the apparent authority which the principal allows him to assume. The fact that the defendants received compensation from Witbeck on several occasions for goods similarly shipped, is strong evidence of the recognition of the authority of the captain thus to act. The counsel for the appellants relies upon the case *Blanchard* agt. *Isaacs* (3 Barb. 388). That case is quite distinguishable from the one at bar. In that case the coat was delivered to the driver of a stage coach, where the business was merely the transportation of passengers with their baggage, and the party who delivered the coat was not a passenger, and was informed by the driver that he could not enter it upon the way bill, but would deliver it to the next agent at Schuylerville, and with a knowledge of these facts the coat was delivered properly at the risk of the owner. In the case at bar the transportation of goods and merchandize was the regular business of the defendants, and no information was given to Witbeck that the captain was not the proper person to receive the trunk. He was then in charge, and assumed to act, and Witbeck reasonably concluded that he was the proper person to treat with (*Langworthy* agt. *N. Y. & H. R. R. Co.* 2 E. D. Smith 195). I am, therefore, of opinion that the judgment should be affirmed with costs.

SUPREME COURT.

IN THE MATTER OF REGULATING AND GRADING EIGHTIETH STREET, BETWEEN FIFTH AVENUE AND THE EAST RIVER

Where a motion is made under the act of 1858 to vacate an assessment for regulating and grading a street in the city of New York, on the ground of collusion and fraud between the street commissioner and the contractor, in awarding the contract to the seeming lowest bidder, when he was in fact nearly

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the highest bidder: The question is not whether the court are inclined to believe or suspect, or whether it is probable a fraud has been committed or may have been committed, but are the parties *proved guilty by the evidence*?

Where the street commissioner is not shown to have had any concert with the contractor, nor is the contract shown to have been procured by fraud, the assessment under the contract cannot be disturbed on that ground.

The *power of the legislature* to pass an act (as they did in this case in 1861,) confirming such contract, and authorizing the assessment, and requiring the city to pay the contractor the money due upon the contract may be authorized by some late decisions of the court of appeals, but it is *very doubtful legislation*, as it respects the proper application and effect of the laws of municipal corporations.

THE petition of Anthony S. Hope shows that an ordinance of the common council of the city of New York was passed in this matter June 14, 1856, by which "Eightieth street, between Fifth avenue and the East river be regulated and graded, under such directions as shall be given by the street commissioner, who may appoint an inspector thereon, and one of the city surveyors;" that for the more speedy execution of the ordinance the work be done at the expense of the common council, on account of the persons respectively upon whom the same might be assessed; that Charles McNeill, Jacob F. Oakley and William Dooley were appointed assessors to make a just and equitable assessment of the expense among the property owners to be benefited. That on or about the 26th of July, 1856, Joseph R. Taylor, who was then street commissioner, gave public notice, inviting estimates, bids, or proposals for the work to be done, stating that the same would be publicly opened on the 6th of August, 1856, at the office of the street commissioner.

That such notice was given under and in consequence of certain provisions of an act of the legislature of the state of New York, passed April 12, 1853, entitled "an act further to amend the charter of the city of New York," by which it was, among other things, provided as follows:

"§ 10. No additional allowance beyond the legal claim, under any contract with the corporation, or for any service on its account, or in its employment, shall ever be allowed."

"§ 12. All work to be done, and all supplies to be furnished for the corporation, involving an expenditure of

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more than two hundred and fifty dollars, shall be by contract, founded on sealed bids or on proposals, made in compliance with public notice for the full period of ten days, and all such contracts, when given, shall be given to the lowest bidder, with adequate security: all such bids or proposals shall be opened by the heads of departments advertising for them, in the presence of the comptroller and such of the parties making them as may desire to be present."

That, as a basis for bids or proposals for the said work, the said street commissioner, with the said notice, did cause to be stated an estimate of the probable amount of work necessary in the performance of the improvement so provided for, as follows:

"The following is an estimate of the probable amount of work to be done, viz: 20,000 cubic yards of rock to excavate and fill or remove; 8,000 cubic yards of earth to excavate fill or remove; 150 running feet of culverts; excess of excavations over filling, 9,000 cubic yards."

That proposals were received by the said street commissioner for the said work, as follows:

	Earth Excavation, per cubic yard.	Rock do., per cubic yard.	Culverts, running feet.
Michael Waters,.....	\$0 25	\$1 00	\$0 25
C. C. Ellis,.....	19	85	2 25
John Gallagher,.....	11	79	1 75
Cornelius Smith,.....	27	1 09	2 00
Thomas Brady,.....	10	91	2 00
John Callahan,.....	31	1 24	3 00
John Kinsley,.....	20	1 10	2 00
John Pettigrew,	15	79	1 00
John Slattery,.....	1 00	00	2 00
Charles Devlin,.....	26	89	90

The petition also states, that at the time the said proposals were so tendered, the said John Slattery was engaged in the performance of a certain other contract, made July 8, 1854, with the said corporation, for grading and regulating Seventy-ninth street (the street next below Eightieth street), from Fifth avenue to the East river, under direction of the

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said street commissioner, that the character of the soil, surface, formation and material of the land of Seventy-ninth and Eightieth streets, between Fifth avenue and the East river, were very similar, and that the quantity of rock excavation necessary in so grading Eightieth street bore but a small proportion to the necessary earth excavation.

That the bid of said Slattery for said Seventy-ninth street contract stated as prices as follows: for earth excavation, per cubic yard, twenty cents, instead of one dollar, and for rock excavation, on the other hand, one dollar and fifty cents per cubic yard.

That proposals were handed in to the street commissioner for the work to be done on Eightieth street at the amounts of their respective bids on the estimated quantities—the aggregate bids of the respective parties were as follows:

1. John Slattery,.....	\$8,300 00
2. John Gallagher,.....	16,942 00
3. John Pettigrew,.....	17,150 00
4. C. C. Ellis,.....	18,857 00
5. Thomas Brady,.....	19,300 00
6. Charles Devlin,.....	20,015 00
7. Michael Waters,.....	22,037 50
8. John Kinsley,.....	23,900 00
9. Cornelius Smith,.....	24,260 00
10. John Callaghan.....	27,730 00

That said contract was, thereupon, by the street commissioner awarded to said Slattery, as being the lowest bidder. And on his report that Slattery was the lowest bidder, such contract was confirmed by the common council September 8, 1856.

The petition then goes on to state, that thereafter, to wit, on or about December 16, 1859, the said John Slattery procured to be made the certificate of one John T. Dodge, city surveyor, stating that under said contract he, said John Slattery, had performed work as follows:

Excavating 8,886 cubic yards of rock.

“ 33,633 cubic yards of earth.

84 feet culvert,

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making the sum claimed by the said John Slattery, to be due him for the said work, \$33,801, or more than four times the amount of the proposal, upon which was awarded to him the said contract, and upon the said certificate, an assessment for the said \$33,801, together with other charges, as follows :

Surveying.....	\$808 79
Inspecting.....	310 00
Advertising.....	100 00
Assessing.....	733 39
Collecting	916 74

amounting in all, to \$36,669 92 was made up, imposing upon the premises of your petitioner, the amount of nine hundred and fifty-two dollars, no notice being taken or allowance made in assessing said premises of the said former assessment for the same purpose.

That the said assessment, as so imposed, was duly confirmed on July 1, 1861; and that the same now appears as a charge and lien imposed upon premises of your petitioner, hereinafter particularly set forth, and a demand has been made upon him for the amounts so imposed upon his said premises.

That in the aforesaid proceedings relative to the said assessment, there was fraud in the aforesaid collusion and improper practice by which the said contract was obtained, and that as well the said contract was and is absolutely void and of no effect, for the reason that the same was not awarded to the lowest bidder with adequate security, thereby absolutely vitiating and making legally irregular and void the said assessment and all proceedings in respect thereto.

That the prices for the work so certified to have been done would have been on the bids of the following persons, as follows :

John Gallagher.....	\$10,866 57
Thomas Brady.....	11,617 59
John Pettigrew.....	12,148 89
C. C. Ellis.....	14,132 37
John Kinsley.....	16,640 60

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Charles Devlin.....	16,728 72
Michael Waters.....	17,315 25
Cornelius Smith.....	18,934 65
John Callaghan.....	21,696 87
John Slattery.....	33,801 00

so that the said contract was, instead of being awarded to the lowest bidder, with adequate security, awarded to the highest of ten bidders.

And your petitioner further says, that the certificate furnished by the said Slattery of William Glieson, the inspector upon the said work, upon which to make the said assessment, states that the said work was finished on December 24, 1859, but that before December 7, 1857, the said the mayor, aldermen and commonalty, in a communication submitted to them by the then street commissioner, on the report of one Daniel Ewen, city surveyor, were notified of the aforesaid invalidity of said contract, and as appears by said report, said John Slattery had been theretofore notified that his said contract was not recognized as valid by the street department, and payment thereon was refused; and that the said the mayor, aldermen and commonalty, had been at various times, and before payments were made to said Slattery on account of said contract, notified of and well knew the matters aforesaid; and that your petitioner had well supposed and believed, that all proceedings in respect to said assessment and contract were at an end, and paid no further attention to the matter, and was in ignorance of any further proceedings in reference thereto, till bills for the amount, so claimed against him, were made out against him and said amount demanded from him.

Upon the petition and notice of motion, an order was made on the 8th of October, 1864, referring the matter to John V. W. Doty, Esq., as referee, to take the evidence and report the same to the court. On the 31st of March, 1865, the referee made his report to the court. The evidence consisted of all the records and papers in the street department, relating to this matter, being introduced and proved before the referee, by the employees and clerks of that department.

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The petitioner's counsel produces and offers in evidence the assessment list or roll in this matter, with the documents comprising the same, and reads therefrom the various indorsements and certificates on the back, the ordinance, the certificate of M. Lovell, deputy street commissioner, as to the work, &c., the general portions or passages of the assessment list, and the passages referring to the lots in question.

The petitioner's counsel also produces and offers in evidence the assessment list or roll, in the matter of regulating and grading Seventy-ninth street, from the Fifth avenue to the East river, with the documents comprising the same, and reads therefrom certificate of M. Lovell, deputy street commissioner, as to the work, &c., and from the list the concluding passages, stating the amount of work. Copies are hereto annexed, marked "H," which may be read in the place of the originals.

Anthony S. Hope, being duly sworn, testifies: I am the petitioner; the lots described in the petition are possessed and owned by me; they were conveyed to me through the deeds which I produce. The deeds were then produced, proved and numbered. The evidence was then closed.

In April, 1861, an act of the legislature was passed in this matter, as follows:

"An act to confirm and legalize a certain contract made with John Slatery, for regulating and grading Eightieth street, in the city of New York.

"Passed April 15, 1861, three-fifths being present.

"The people of the state of New York, represented in senate and assembly, do enact as follows:

"§ 1. The contract made with John Slatery for regulating and grading Eightieth street, in the city of New York, from Fifth avenue to the East river, bearing date September fifteenth, eighteen hundred and fifty-six, is hereby confirmed and declared to be valid and in full force and effect.

"§ 2. The mayor, aldermen and commonalty of the city of New York, are hereby authorized to levy an assessment on the property benefited by said regulating and grading of

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Eightieth street, from Fifth avenue to the East river, to the extent of reimbursing the said mayor, aldermen and commonalty, any amount of moneys paid under this act and the said contract with John Slatery.

“§ 3. The comptroller of the city of New York, is hereby authorized and required to ascertain the amount of money legally due, to said John Slatery, upon said contract, and to draw his warrant for the same.”

MAN & PARSONS, *attorneys, and*
JOHN E. PARSONS, *counsel for petitioner.*

I. The contractor Slattery, and Joseph S. Taylor, the street commissioner, conspired, by the contract of Slattery with the corporation, and by the proposals on which it was based, to defraud.

1. Before the proposals were issued Slattery had contracted for and was engaged in regulating and grading Seventy-ninth street—also from Fifth avenue to the East river.

The probable proportionate amount of rock and earth excavation was the same for Eightieth street as for Seventy-ninth street. (*Vide Daniel Ewen's report of December 7, 1857, to the street commissioner; by him reported to the common council.*)

Slattery knew this, for he had done the work, and Taylor knew it necessarily from Slattery's returns to him. This proportion is sufficiently proved by Mr. Ewen's language: “shows no rock, but is all earth.”

The parties knowing this, the proposals for Eightieth street state the estimated quantities which are intended to guide contractors in making their bids at rock excavation, 20,000 yards; earth excavation, 8,000 yards. (*Vide the notice to contractors signed by Taylor, dated July 26, 1856.*)

Slattery, conforming his bid to the concerted arrangement, offers to do rock excavation for, per cubic yard, 00! earth excavation for, per cubic yard, \$1.00!

It being worth about seventy cents a yard for rock, and

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twenty cents for earth excavation (*Vide Mr. Ewen's same report*), and Slattery and the street commissioner knowing this, knew that on these estimated quantities every honest proposal would make an aggregate price much beyond Slattery's, though on the true quantities as they afterwards turned out, and at the time were known to Slattery and Taylor, vastly below his: while on the other hand, Slattery, by making his proposal at one dollar a yard for earth and nothing for rock excavation on the estimated quantities, would, though on the true quantities vastly the highest, seem to be the lowest bidder, and so give Taylor an opportunity to award him a contract, which would result as shown below in this case.

The true quantities proved to be just as it was known they must be: rock 8,886 yards instead of 20,000; earth 33,663 yards instead of 8,000. (*Vide Mr. Dodge's certificate with the assessment, dated December 16, 1859.*)

To remove all doubt of Slattery's complicity with Taylor, for Seventy-ninth street his bid and contract were: for rock excavation, per cubic yard, one dollar and fifty cents; for earth excavation, per cubic yard, forty cents; preserving a proper proportion, but in Mr. Ewen's language: "I have no hesitation in saying that these prices were double the value of the work," and indicating Slattery's fraud in Seventy-ninth street assessment for which the corporation refused to recognize his claim in that case (*vide Mr. Ewen's last communication*), and he was subsequently made to disgorge \$17,036.91. (*Vide paper marked 9, and comptroller's letter of November 28, 1862.*)

2. It was therefore impossible that Slattery should honestly offer or Taylor honestly accept a proposal at one dollar for earth, and nothing for rock excavation.

When for the same character of work on the next street, Slattery was getting one dollar and fifty for rock and forty cents for earth.

II. While the charter for 1853 only permitted a contract with the lowest bidder, Slattery was not only not—

1. The lowest bidder; he was greatly the highest.

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The work done was of (*vide Mr. Dodge's certificate before referred to*), rock excavation, 8,886 yards; earth excavation, 33,633 yards.

On these actual quantities, calculating the various bids, and it will appear that while Slattery's bid reaches the enormous figure of \$33,801 00, the bids of the following were :

John Gallagher,.....	\$10,866 57
Thomas Brady,.....	11,617 59
John Pettigrew,.....	12,148 89

As a contrast to this; on the fraudulent estimate, Slattery's bid was \$8,300, instead of \$33,801 00.

And the honest bids of the above parties, (of course much larger on the estimated than on the true items by reason of the 20,000 of pretended rock excavation) :

John Gallagher,.....	\$16,942
Thomas Brady,.....	19,300
John Pettigrew,.....	17,150

2. Slattery and the street commissioner both well knew such would be the case: his bid and the proposals were framed to bring about just this result.

3. A fair price to Slattery for the work done, would be at the rates above stated from Mr. Ewen's report for 8,886 yards of rock, at seventy cents, \$6,220.20; 33,633 yards of earth, at twenty cents, \$6,726.60. Total, \$12,946.80, instead of the \$33,801 Slattery claims.

The effect of the diminished quantity of actual rock excavation, as contrasted with the estimated quantity, was to make the actual expense to Slattery about one-third what it would have been, had the actual excavation corresponded with the estimate. He has, therefore, done about one-third what he proposed, but he claims for it four times as much.

Slattery's bid on the proposed quantities, was \$8,300, embracing 20,000 yards of rock excavation.

The rock excavation is reduced from 20,000 to 8,886 yards; less than half, and yet the price increases with greatly reduced work to \$33,801, four times that proposed.

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III. All the above facts and others, and the deductions we claim, and our charges of fraud are stated at length, and so also further established by the corporation itself.

And this too before Slattery was paid a cent, or had progressed considerably with his work. And the corporation at the same time notified Slattery that his contract was void and illegal, and directed him not to proceed. (*Vide the whole matter stated at length in the street commissioner's report of January, 1859, to the common council; returned with the other papers and printed with the proceedings of the common council.*)

This operated as ample notice to the corporation and dispensed with the propriety of further notice from the objectors who relied upon the corporation's own formal notice.

IV. It is further evident that Slattery knew of the invalidity of his contract from the fact that he applied to the legislature and procured the passage of an act by the aid of which he hoped to be more successful in his raid upon the city treasury (*Laws of 1861, p. 569*).

By the act, Slattery's contract by section one, "is hereby confirmed, and declared to be valid and in full force and effect."

By section two the corporation are authorized to levy an assessment "to the extent of reimbursing the mayor, aldermen and commonalty any amount of moneys paid under this act and (on) the said contract."

1. The passage of the act shows that the contract was recognized as invalid without legislative aid.

2. It surely can need no argument to demonstrate that the legislature had no power to impose upon the property holders a liability when none in fact existed.

V. But the assessment does not even follow the act, and this leads to a further objection to the assessment.

The "moneys paid" on contract consisted of the sum of $\$13,477.38 \times \$2,296.77 = \$15,774.15$. The amount of the assessment is $\$36,699.92$, of which $\$17,036.91$ was an amount of which Slattery had defrauded the corporation on his

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Seventy-ninth street contract. (*Vide statement of payment, and letter from the comptroller's office.*)

By the assessment, the corporation seeks to compel the innocent property holders who institute this proceeding to refund an amount of which this same Slattery had cheated it before his Eightieth street fraud; as Mr. Taylor must have well known, who yet gave the contract to Slattery, though in his proposal for bids he had published as a blind "no estimate will be received from any person who has previously violated any contract with this department."

VI. Before stating our propositions of law, it is well to consider the position of the city, with respect to assessments for improvements, of the character of that in this case.

1. The work is done at the expense of the property benefited, and by the act of April 9, 1813 (*Davies' Laws*, p. 527), the expense is to be collected from such property, and then applied to pay for the work. No provision was made for the city paying the contractor, and reimbursing itself from the collections on the assessment. (*Lake agt. The Trustees of Williamsburgh*, 4 Den., 520; *McCullough agt. The Mayor of Brooklyn*, 23 Wend. 458). By subsequent provisions and acts, the corporation is permitted to anticipate to the contractor the collection from the assessment; becoming thereby substituted to the right of the contract, or if he have any, against the property benefited; but the right of the city is never an enlargement of the right of the contractor; is always limited to it. In this case the city occupies the position of Slattery, and with reference to any claim against the property holders, has no better or larger claim than had he. (*Davies' Laws*, p. 567; *Laws of 1824*, p. 39.) The petitioners therefore say:

First. The contract was in fraud of their rights. Property holders are mere passive victims of corporation frauds. The most they can do, though not so required, is to give notice of the fraud; in this case, the city was apprised of it in 1857. The fraud therefore vitiates the assessment.

Second. The contract, and all proceedings based upon it, were also void, under the charter of 1853, as having been

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given to the highest instead of the lowest bidder. (*Brady agt. The Mayor*, 2 *Bosworth*, 173; *affirmed* 20 *New York*, 6 *Smith*, 312.) All the bids were in the prescribed form, with adequate security; corresponding, in every respect, to the requirements of the ordinance.

Third. To save the expense to themselves and the city of numerous suits or proceedings, in which the city would be unsuccessful, parties representing the larger part of the assessment unite in one proceeding applying for a *certiorari*.

Different persons properly unite in the application. (*In the matter of the Third avenue assessment*, *INGRAHAM, J.*)

Fourth. *Certiorari* is the appropriate proceeding.

1. No relief can be granted under the act of April 17, 1858. (*Laws of 1858*, p. 574; *In the matter of Duane street*, *INGRAHAM, J.*; *In the matter of Second avenue*, *SUTHERLAND, J.*; *Miller's case*, 12 *Abbott*, 121; *Horn's case*, *Id.* 124.)

2. Nor under the act of May 7, 1841 (*Laws of 1841*, p. 143). The assessors have no power to consider the validity of an assessment. Their only jurisdiction is to make a just and equitable assessment of the aggregate amount assessed, "among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." (*Davies' Laws*, p. 526; *Le Roy agt. The Mayor, &c. of New York*, 20 *Johns.* 430.)

3. Nor by action; the courts have uniformly refused relief by action, where the record shows the invalidity, on the very ground that the proper remedy was by *certiorari*. (*Heywood agt. City of Buffalo*, 14 *N. Y.* 4 *Kern.* 534; *Letts agt. City of Williamsburgh*, 15 *Barb.* 255; *Bouton agt. The city of Brooklyn*, 15 *Barb.* 375; *Van Doren agt. The Mayor of New York*, 9 *Paige*, 388; *Mayor, &c. of Brooklyn agt. Messerole*, 26 *Wend.* 132; *Mace agt. The Trustees of Newburgh*, 15 *How. Pr.* 161.)

Fifth. The confirmation of the assessment was a judicial act; in this case exercised without jurisdiction on the part of the city or its board of assessors.

The corporation has no power to impose upon property

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owners a charge which could not be legally enforced by the party in whose favor it is imposed.

The complainants being numerous, the court will not compel them to individual actions for the recovery of amounts illegally exacted, but having by a single proceeding the matter and all the parties before it, will prevent by its action, a multiplicity of suits. (*Bouton* agt. *The city of Brooklyn*, 7 *How.* 198; *The People* agt. *The city of Brooklyn*, 9 *Barb.* 535; *Betts* agt. *The city of Williamsburgh*, 15 *Id.* 255; *Le Roy* agt. *The Mayor, &c. of New York*, 20 *John.* 430; *Starr* agt. *The Trustees, &c. of Rochester*, 6 *Wend.* 565; *Wilson* agt. *The Mayor, &c. of New York*, 1 *Abbott*, 15.)

All the cases affirm the power of the court to review such proceedings by *certiorari*, though in some cases denying the writ on the ground of expediency; but it will be seen that this case differs from all those in which the writ has been refused or quashed. Those cases proceed upon the ground that complete relief may be had by action to recover the amount exacted; that the relator has been guilty of delay; that an action would confine the relief to the individual case of the relator, while the allowance of the writ would upset the whole assessment; that the proceeding can only remove the record, and therefore confines the attention of the court to matters spread upon its face; that in the special case before the court, there was doubt whether the act sought to be reviewed was judicial or ministerial. The answer in this case to such objections is complete:

1. To drive the parties to action at law would be oppressive, entailing great expense, and making heavy costs against the city. They are numerous; this is one proceeding presenting conveniently what else would only be determined by many costly actions. The relief on this proceeding is summary—by action only after protracted delay. The court has full equitable jurisdiction, and the prevention of a multiplicity of suits is always a ground of equitable interference.

2. There has been no delay. The parties proceed as soon as they are informed of the assessment, at a less interval from the information than in the Third avenue case.

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3. The parties complaining, represent a large proportion of the assessments ; which, being fraudulent and void, should be set aside as to all affected by it.

4. The matters complained of, are patent on the face of the record ; require no explanation or evidence, and by all the authorities, the confirmation of the assessment, is a judicial act.

5. Vacating the confirmation, permits a new assessment for any amount, which might prove chargeable against the property.

6. The court should facilitate proceedings of this kind calculated in a ready, simple way, without delay or expense, to upset such glaring frauds, now so prevalent : to drive parties to troublesome and expensive actions, would be so to embarrass relief from such frauds, as to make parties prefer to remain quiet under the infliction of them, and thus indirectly to encourage them. The amounts, in many cases being small, would not warrant the expense of separate actions.

Sixth. An assessment proceeding is on the part of the corporation, the board of assessors being one of its bureau. The writ is, therefore, properly directed to the mayor, &c. And the record consists, not merely of what the assessors may see fit to incorporate in the roll, but of all the proceedings essential to show a valid assessment ; the ordinance estimate, proposals, bids, award, confirmation, contract, certificate of work done, action of the assessors, &c., &c., and all action of the common council in respect to the proceeding. The record thus made up, in this case, proves the illegality of the assessment.

1. By reason of Slattery not having been the lowest bidder.

2. By reason of his fraudulent complicity with the street commissioner. The circumstances are inconsistent with honest intent, and lead irresistibly to the inference of fraud. If, as was objected, Mr. Ewen's communications, and the report embracing them, are no part of the record, they merely state the inference of fraud, which the court itself will make.

In the matter of Eightieth street.

Seventh. The motion to set aside should be granted.

JOHN E. DEVELIN, *counsel to the corporation.*

By the court, BARNARD J. Assuming that the case presented by the petitioner is one, which if true entitles the petitioner to the relief afforded by the act of 1858, it is not sustained by the evidence. The charge is that the contract was obtained by Slattery by a fraudulent conspiracy and collusion with the then street commissioner. That by agreement with Slattery the street commissioner estimated the earth excavation at a much less amount and the rock excavation at a much greater amount than it really was, so that Slattery by bidding a large price for earth excavation and nothing for rock would seem to be the lowest bidder, while in fact he would be the highest bidder on the contract. The proof shows that the street commissioner took the initiatory steps according to law.

The notice was duly published and estimated the probable amounts of rock and earth excavation, and invited bids for each kind of excavation and requiring that an affidavit from persons bidding should accompany these bids, that the bid was made without collusion or fraud, and that no member of the city government was directly or indirectly interested therein. Slattery's bid on this bidding was the lowest bid according to the estimates of the street commissioner, and the contract was duly and legally awarded to him. There is no proof whatever showing any concert between the street commissioner and Slattery. The result shows more earth and less rock than the estimates. Slattery was the contractor of Seventy-ninth street, which had been just completed, and that work established that the earth largely exceeded the rock excavation upon Seventy-fifth street, and from this evidence alone the petitioner proves the fraud. It is insufficient to prove fraud. The question is not whether we are inclined to believe or suspect, or whether it is probable a fraud has been committed or may have been committed, but *are these parties provably guilty by the evi-*

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dence? Eightieth street showed nearly twice the amount of rock which Seventy-ninth street did. Doubtless no contractor bid without examination of the proposed work, and they could judge of the probable correctness of the estimates. Slattery may have been guided in his bid by the results of Seventy-ninth street.

The street commissioner is not shown to have had any concert with Slattery or any other contractor, nor is the contract shown to have been procured by fraud. If there were facts, which it is easy to believe there were, showing a guilty combination between the contractor and the street commissioner, the act of 1861 legalizes the assessment. The work cost the city the amount of money for which the assessment is made. The contract with Slattery is confirmed. An assessment is authorized and the city is required to pay Slattery the money due "upon said contract."

The power of the legislature to pass this act is undoubted (*Brewster agt. The City of Syracuse*, 19 N. Y. 116).

The act embraces but one subject.

Order affirmed with costs.

INGRAHAM, P. J. I concur in this decision, on the ground that the legislature have passed a law making the assessment valid and directing an assessment to be levied, not because I consider such a law proper, but because the late decisions of the court of appeals in regard to the power of the legislature seem intended to carry that power much further than has heretofore been supposed to be the law in regard to municipal corporations.

SUPREME COURT.

THE GROCERS' NATIONAL BANK agt. GEORGE A. CLARK.

It is the right of a party affected to assail an act of a public officer for want of jurisdiction; and he does not preclude himself from so doing by any agreement not to raise the question, even if founded on a sufficient consideration.

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Appearing and participating in proceedings over which a court or officer *has not jurisdiction*, does not prevent a party from assailing them for want of it.

Where an officer has authority and jurisdiction to grant a *discharge* to an imprisoned, insolvent debtor, under the Revised Statutes (*Art. 5, ch. 5, tit. 1, part 2*), a plaintiff in an action against such debtor, has a right to object to the discharge of the defendant *from arrest* upon or by reason of his claim, unless it is a claim *arising on contract*.

And the plaintiff is not precluded from making such objection, by reason of his having appeared before the officer and opposed generally the debtor's application for his discharge.

The *forms of the counts*, in a complaint, do not in all cases furnish the court the best evidence of the real nature of the plaintiff's claim. The *facts* out of which it originated must be ascertained in order to comprehend the real ground of the action.

Where the first cause of action mentioned in the plaintiff's complaint is, what would have been called (when it had a name) *trover*; and the second cause of action *case*, to recover damages for fraudulently certifying bank checks, by means whereof a large sum of money was fraudulently abstracted from the plaintiff: *Held*, that both causes of action are in *tort* and not on *contract*.

The plaintiff might have waived the fraudulent conversion, and sued the defendant for so much money had and received to its use; but not having done so, the *discharge* of the defendant does not apply to his imprisonment upon the plaintiff's claim. His discharge applies only to debts arising on *contract*.

New York Special Term, June, 1866.

Before MULLIN, Justice.

MOTION by defendant to exonerate bail.

The defendant was deputy cashier of the plaintiff, and while holding that office and in the year 1857, he is charged with having fraudulently certified checks drawn upon said bank, by means whereof he fraudulently obtained \$68,000 of the moneys of the said bank and converted the same to his own use, or to the use of some person other than the said bank.

On discovering this alleged fraudulent use of the funds of the bank, the plaintiff commenced an action in the supreme court against the defendant and caused him to be arrested and for want of bail he was imprisoned in the jail of the county of Kings, in which county he was arrested. The defendant was afterwards let to bail in the sum of \$20,000. While he was in prison he applied to the county judge of said county of Kings, pursuant to the 5th article of chapter 5, title 1 of part 2 of the Revised Statutes, relating to voluntary assignments by an insolvent for the

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purpose of exonerating his person from imprisonment to be discharged upon complying with said article.

The plaintiff appeared before the said judge, and by its counsel opposed the defendant's discharge. A jury was summoned and impannelled to try certain issues raised by the plaintiff's counsel and other parties opposing; said issues were found in favor of the defendant, and the county judge ordered the defendant's person discharged from imprisonment, pursuant to the prayer of his petition and of the provisions of the statute aforesaid. Such discharge being granted, the defendant's counsel makes this motion in behalf of the bail of the defendant to discharge them from further liability on their undertaking.

BARNEY, BUTLER & PARSONS, *attorneys, and*
GEORGE W. PARSONS, *counsel for defendant.*

In this action plaintiffs claim that defendant was guilty of certain malfeasances in the performance of his duties as paying teller or assistant cashier of the late Grocers' Bank, and bring this action to recover the amounts which it is alleged that defendant caused to be misappropriated, and the concluding paragraph in the complaint is "and the defendant is now indebted to plaintiffs for the said claim," &c., and at folio 2, of the affidavit upon which the order was obtained plaintiffs' cashier states "that the debt which is the cause of this action was incurred by the defendant in the misapplication," &c.

The defendant was arrested under an order of arrest issued in the action, and imprisoned in Kings county jail. While so imprisoned he petitioned to Judge DIKEMAN, county judge of Kings county, for a discharge from all imprisonment, pursuant to the provisions of article 5, title 1, chapter 5, part 2 of Revised Statutes.

After the commencement of such proceedings, but before the discharge was actually granted, defendant was admitted to bail in this action. The discharge having been granted after a full contest in respect to all questions which could

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be urged against it, the bail now seek to be exonerated. The case is still at issue.

First. This is unquestionably the proper remedy for the bail. (*Kane* agt. *Ingraham*, 2 *Johns. Cases* 403; *Seaman* agt. *Drake*, 1 *Caines' R.* 9; *Cheatham* agt. *Lewis*, 2 *Johns.* 104; *Olcut* agt. *Lilly*, 4 *Johns.* 407; principle applied in *Franklin* agt. *Thurber*, 1 *Cow.* 427; *Code* § 191.)

1. It is held in the above cases that a formal surrender of the defendant before making such a motion is unnecessary.

Second. The plaintiffs having appeared on the insolvent proceedings and contested the petitioner's right to the discharge upon every ground, and those questions having been adjudicated in such proceedings and judgment given in our favor, as appears by the discharge, it is not competent for plaintiffs in this collateral way to assail such judgment or discharge. If not satisfied with the result there, they had their remedy by appeal to test the validity of the discharge. (*Field* agt. *Howland*, 17 *Johns.* 25; *Rich* agt. *Salhinger*, 11 *Abbott* 344, and cases cited; *Stuart* agt. *Salhinger*, 14 *Id.* 291, and cases cited.)

The discharge is presumptive evidence of all the facts asserted in it, and is conclusive until overthrown by evidence of some fraud. (*Campbell* agt. *Perkins*, 4 *Seld.* 437; *Sherwood* agt. *Mitchell*, 4 *Denio* 437.)

Third. But if the court felt authorized thus to review the proceedings and decision of the judge who granted the discharge, the objection that such a discharge does not reach or cover the claims in this action is untenable.

1. The objection is too sweeping. All arrests and imprisonments under the Code are upon some charge of tort, and plaintiffs' objection would virtually abrogate this statute, which the Code expressly preserves. (§ 179 *Code*; § 471 *Code*.)

Fourth. Again, plaintiffs have not prosecuted for the tort. They sue in a civil action to recover a debt as they allege in both the affidavit used to obtain the order and in their complaint (*Folio* 2, affidavit, last clause in complaint).

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1. It was always competent to waive any tort, even a theft, and sue on an implied assumpsit.

2 They sue for the exact sum they say was misapplied or used by defendant.

3. They are concluded by their own pleading from saying this claim is not sued for as a debt, a money demand, or in the language of the Code, "for money received." (*Sub. 2*, § 179; *Campbell agt. Perkins*, 4 *Seld.* 430, 438 and 441.)

Fifth. The language of article three, section thirty-three and thirty-four, and article five, section ten and eleven, in respect to the terms and effect of the discharges, are almost identical, and it has been repeatedly held that discharges obtained pursuant to article three would exonerate from arrest even for tort.

1. Article three contains provisions of law enacted originally in 1813, and enables an insolvent debtor with the aid of two-thirds in amount of his creditors, not only to be discharged from his debts but to be released from arrest and imprisonment.

2. Next came article four, laws of 1817, which provides for compelling a debtor imprisoned in a civil action to assign his estate and take his discharge from imprisonment.

3. Then follows article five, laws of 1819, to enable any debtor, on making a proper assignment of all his property, to be exonerated from arrest, and if actually imprisoned to be discharged from that, but not from his debts; and this whether the claims be in judgment or not.

4. Article six, passed subsequently, provides for discharges where debtors are imprisoned on execution.

In *Burns agt. Baker* (1 *Johns. C.* 134), defendant sought to be discharged under the "act for the relief of debtors with respect to the imprisonment of their persons." One of the objections urged was that defendant was in custody in a suit for a tort, a breach of promise. The court held the objection untenable.

In *Luther agt. Dey* (19 *Wend.* 629), it was held that an insolvent's discharge whether obtained upon the joint application of the insolvent and his creditors, or upon his sole

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application to exonerate his person from imprisonment, operates as well upon debts arising *ex delicto* as upon those arising *ex contractu*. In that case the imprisonment was in an action of trover for conversion of property.

The same principle was affirmed in *Deyo agt. Van Valkenburgh* (5 Hill 242).

In case of *Stewart agt. Killman*, quoted in the marginal note of last case but one cited, the imprisonment was in an action of replevin, and the discharge had been obtained under the same article five, under which we now proceed, "of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment," and the court held the discharge sufficient, the chief justice ordered the defendant to be released.

In the case of *Clapper agt. Betts*, reported in same place in case of proceedings under the same article (5), the court, BRONSON, J., the imprisonment being in an action of trespass, ordered the discharge of the defendant.

In the case of *The People &c., agt. The Marine Court* (3 Cow. 366), where a discharge had been obtained under a similar statute—laws of 1813, and the judgment on which it was sought to hold defendant was for an assault and battery, the supreme court held that defendant was entitled to his discharge; also *ex parte Thayer* (4 Cow. 66).

It the case of *Hayden agt. Palmer* (24 Wend. 364), the proceedings for the discharge had been taken under article five, and the objection was that the judgment had been obtained in an action of trover. The court, NELSON, Chief Justice, held that the discharge was good.

Sixth. Article five of the statute makes no distinction between claims liquidated and unliquidated, between those not in judgment and those in judgment; nor would there be any sense in making a distinction (*Clinton agt. Hart*, 1 John. R. p. 375).

1. The only cases where any such distinction is made is where the proceedings have been taken under article three, where a discharge from *all debts* is sought upon the basis of having obtained two-thirds of all the creditors to the petition,

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and the courts very properly say in such cases it could not be determined as to claims for unliquidated damages, whether the requisite amount have petitioned. But they concede that where such claims have been liquidated by the recovery of judgments the discharge is effectual as to those as well as to claims in actions *ex contractu*.

2. Another answer is the point before urged, that the claim here is for specific amounts, which are as definite as a claim for goods sold and delivered.

Seventh. But principles established in the well considered case of *Hatten agt. Speyer* (1 *John. R.* 37), seem to show very conclusively that no such distinctions exist as is claimed by plaintiffs, in respect to the character of the claims for which the action is brought. (See also last part of page 439, *Campbell agt. Perkins*, 4 *Seld.* pp. 440, 441.)

'1. As before urged, the only sense in any distinction which ever existed was in reference to the act under which a discharge from *debts* was sought, and it was held in some cases that if it appeared from the action that the damages were incapable of liquidation, *e. g.*, damages in actions for assault and battery, they could not be estimated under the two-third act, and hence could not be discharged or affected by a discharge.

WILLIAM A. COURSEN, *counsel for plaintiffs.*

First. There is no practice warranting this motion. If the discharge mentioned in the affidavit of the defendant, read on this motion, operates to discharge the effect of the order of arrest in this action, then such discharge can be pleaded at such time as an action may be brought in which the discharge can be a defense. The court will not now anticipate any action, and in advance give affirmative relief to the defendant.

Second. The statute under which the discharge was obtained does not refer to and has no possible effect upon any debts or debtors, except those arising upon or connected

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with contracts. (*See the 1st section of the statute, article 5, chap. 4, part 2, R. S.*)

The action now before the court arises solely on a *tort*. This is not only beyond dispute, but the defendant has very earnestly pressed that fact upon the attention of this court on a motion to vacate the order of arrest, and on his appeal to the general term, on both of which occasions the sole argument (that was at all attended to) was that this action was upon a *tort*, and was not brought by the original owner of the claim, and that as a *tort*, it (the claim) was not assignable. (17 *Wend.* 480 ; 24 *Id.* 366.)

Third. No case can be found in which the statute was applied to debts on torts. Indeed it would be manifestly a perversion of the use of language if it were done. The statute applies exclusively to debts arising upon contracts, and as clearly so as words can express or designate anything. All the cases quoted applied to debts on contracts originally, or else to judgments obtained in actions upon torts. We all admit that *after* A JUDGMENT is obtained, then no matter what the aspect of the debt or claim had been, the judgment makes it a *quasi contract*. The one great feature of a claim on a *tort*—the indefiniteness of amount—is gone, and the law makes an implied contract for any defendant to pay a judgment obtained against him.

Fourth. In regard to the appearance of the plaintiffs on the order to show cause before Judge DIKEMAN, we reply : That the question of the defendant's good faith in making up his schedule was the sole question tried before the jury or passed upon by the court. That question is not a matter of contest before this court, and is in fact of no further moment. The schedule was passed upon by a jury and pronounced to be perfect. The county judge did not pretend to (and there is nothing bearing on that point now before the court) dispose of the question whether or not a discharge under that "order to show cause" would be a discharge in this action.

We also call the court's attention to the wording of the order to show cause, whereby it appears the arrest in this

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action was specifically brought before the county judge, and yet it is indisputable that the county judge made no decision whatever on that portion of the order to show cause.

By the court, MULLIN, J. I shall examine but two of the questions raised by counsel on this motion. These are, first: Whether the plaintiff by appearing before the county judge and opposing defendant's discharge is estopped from disputing the validity of such discharge as applied to the claim for which the defendant was imprisoned? and, second: Whether the discharge granted by the said judge applies to and discharges the defendant from imprisonment for the claim, on account of which the arrest and imprisonment were had?

1st. As to whether the plaintiff is estopped from disputing the application of the discharge to its claim.

It is not denied but that the county judge acquired jurisdiction of the proceeding, nor but that the discharge granted operates to discharge the person of the plaintiff from imprisonment "*by reason of any debts arising on contracts previously made.*"

The question therefore is, whether the discharge applies to the arrest, upon the plaintiff's claim. It does apply if the claim is a debt arising on contract, not otherwise. To give to the discharge an effect greater than is permitted by the statute, would be to extend the jurisdiction of the officer by consent, to a case not only not contemplated but impliedly excluded from it. It is the right of the party affected to assail an act of a public officer for want of jurisdiction, and he does not preclude himself from so doing by any agreement not to raise the question, even if founded on a sufficient consideration (*Dudley agt. Mayhew*, 3 Comst. 9).

Appearing and participating in proceedings over which a court or officer has not jurisdiction, does not prevent a party from assailing them for want of it (*Garcie agt. Sheldon*, 3 Barb. 232).

But there was no want of jurisdiction in the officer to do all that he has attempted to do. The difficulty, if there is

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any, lies in claiming for the discharge a much larger operation than is intended to be given to it by the statute.

The plaintiff has an undoubted right to object to the discharge of the defendant from arrest, upon or by reason of its claim, unless it is a claim arising on contract.

This brings me to the second and the only question of importance arising on this motion. Does the discharge apply to the claim of the plaintiff?

By the first section of article five above cited, it is provided that every insolvent debtor may present a petition to one of the officers named therein, praying that his estate may be assigned for the benefit of all his creditors, and that his person may be thereafter exempted from arrest or imprisonment by reason of any debts arising upon contracts previously made.

After prescribing the mode of proceeding upon such petition, the tenth section provides, that upon the imprisoned debtor complying with the provisions of the act, the officer to whom the petition was presented shall grant a discharge, declaring, and its effect is, that the person of such insolvent shall forever thereafter be exempted from imprisonment by reason of any debt due at the time of his assigning his property in obedience to said statute, or contracted before that time though payable afterwards, and by reason of any liabilities incurred by him by making or indorsing any note or bill of exchange, or incurred by him in consequence of the payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment was made before or after such assignment.

It will be seen by reference to the provisions of the tenth section that it is *debts arising on contract only* that are discharged. Is the plaintiff's claim a debt arising on contract?

The pleadings may not under the Code present the facts upon which the plaintiff's right to recover rests. The plaintiff may under the present, as well as under the former practice, waive a tort, and seek to recover upon an implied promise to pay the debt or perform the duty set forth in the complaint. In this, as well as in other cases which might be

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enumerated, the plaintiff may proceed for a cause of action different from that which the facts in the case if disclosed would warrant. It follows that the form of the count does not in all cases furnish the court the best evidence of the real nature of the plaintiff's claim. The facts out of which it originated must be ascertained in order to comprehend the real ground of the action.

In this case the first cause of action set out in the complaint is in trover. The second is, what under the old practice would have been designated a count in case, to recover damages for the fraudulently certifying that the drawers of checks upon the plaintiffs' bank had funds therein applicable to the payment thereof, whereas in truth and in fact the drawers had no funds in said bank, by means whereof a large sum of money was fraudulently abstracted from said bank.

Unless these facts create the relation of debtor and creditor between the defendant and the plaintiff, the claim of the latter is not a debt arising on contract. It is impossible it seems to me that a fraudulent conversion of the plaintiff's money can against the will of the plaintiff be construed into a contract by which the one agrees to receive and the other to pay the money thus fraudulently abstracted.

It is true that plaintiff might waive the fraudulent conversion and sue the defendant for so much money had and received to its use, and if it had done so the defendant might be entitled to his discharge, but it has not so done. Both causes of action are in tort and not on contract. It has not waived the wrong and elected to treat the defendant as its debtor. It charges him with the fraud, and demands the damages which it has sustained by reason of it. The use of the words "*debt*," "*demand*" or "*indebted*" in the complaint does not determine the nature of the action; that can be ascertained only from the whole complaint, and not from particular words or phrases which may be contained in it.

Treating the action as one in tort, it follows that the

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discharge does not apply to the imprisonment of the defendant upon the claim set forth in the complaint.

It was held in *Crouch* agt. *Gridley* (6 *Hill* 250), that a discharge in bankruptcy did not affect the defendant's liability for seduction, although the cause had been tried by referees, the amount of damages agreed upon, and a report signed but not delivered before the discharge. The courts say there is no ground for saying that the discharge reaches his (the defendant's) liability for this tort, unless the plaintiffs' demand had become a debt before the petition was presented. Cases are cited by BRONSON, J., to show that even if a verdict had been rendered the claim for the tort would not have been impaired.

Kellogg agt. *Schuyler* (2 *Denio* 73), holds that a verdict in trespass recovered before proceedings in bankruptcy, is not affected thereby.

In *Strong* agt. *White* (9 *Johns. R.* 161), the defendant was charged in execution for damages and costs in an action for libel. He afterwards obtained a discharge under the insolvent act and was brought up on *habeas corpus* to be discharged. The court says an action for libel is not for a debt or on a contract express or implied within the meaning of the act of the insolvent act of 1811, chapter 123.

In *Spalding* agt. *The People* (7 *Hill* 301), a fine imposed for violating an injunction was held not to be affected by a discharge in bankruptcy.

The case of *Hodges* agt. *Chase* (2 *Wend.* 248), is directly in point and conclusive of this motion. In that case the plaintiff in vacation obtained a verdict against the defendant in trespass. After the verdict, but before judgment, the defendant obtained a discharge in proceedings to exempt his person from imprisonment, and a motion was thereupon made to so enter the judgment as to exempt the body of defendant from imprisonment. But MARCY, J., held that the verdict was not a debt at the time of granting the discharge, and it did not therefore protect the defendant (See also *Smith* agt. *Bennett*, 17 *Wend.* 479; *Kennedy* agt. *Strong*, 10 *J. R.* 289; 14 *Id.* 128.)

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In the following cases it was held that a discharge under the act providing for the discharge of the person of a debtor from imprisonment, applied to judgments in actions for torts as well as contracts. (*The People* agt. *The Marine Court*, 3 Cow. 366; *Ex parte Thayer*, 4 Cow. 66; *Hayden* agt. *Palmer*, 24 Wend. 364; *Luther* agt. *Deyo*, 19 Id. 629, and cases cited in note.) In the cases last cited as well as in the cases referred to in the notes to it, judgment must have been recovered, as in all of them the defendants were in custody under a writ of *ca. sa.*, which issued only to enforce a judgment.

No case has been cited nor have I been able to find any in which it has been held that a discharge in bankruptcy or insolvency affects actions of tort, unless judgments have been entered. The issues joined in this case have not been tried, and of course no judgment has been entered and the defendant is not within the principle of the cases last cited.

I am, therefore, constrained to deny the motion to exonerate the bail, with \$10 costs of the motion.

Anthony agt. Brouwer.

SUPREME COURT.

THEOPHILUS ANTHONY, the husband and executor of the last will and testament of **SARAH WILHELMINA ANTHONY**, deceased, appellant, agt. **JACOB BROUWER**, executor of and trustee under the last will and testament of **JAMES GILL**, deceased, **THEOPHILUS A. GILL**, **JOHN R. GILL**, **ROBERT T. GILL**, **ANN GILL**, **ELIZABETH GILL** and **SARAH W. GILL**, respondents. (*First appeal.*)

JOHN R. GILL, **ROBERT T. GILL**, **ANN GILL**, **ELIZABETH GILL**, and **SARAH GILL**, appellants, agt. **JACOB BROUWER**, executor, &c., of **JAMES GILL**, deceased, **THEOPHILUS A. GILL**, and **THEOPHILUS ANTHONY**, executor, &c., of **SARAH W. ANTHONY**, deceased, respondents. (*Cross appeal.*)

The testator gave to his executors two-thirds of his estate, real and personal, in trust, to pay the interest thereof to his sister, S. W. A., during her life, and upon her death the whole two-thirds to be paid to his brother, T. G., coupled with the following declaration :

"It being my intention by this my will, that, after the said annuities shall cease to become due and payable, that the said two-thirds or remainder of my estate shall go and belong to my said brother, T. G., to the exclusion of all my other brothers and relations :"

Held, that the brother, T. G., having died before the testator, the principal fund (two-thirds of the estate) *lapsed*, and became distributable among the testator's next of kin—under the statute of distributions, as in cases of intestacy as a vested estate. The payment thereof was, however, postponed until the death of the sister, S. W. A., who was to receive the income of the whole during her natural life. And S. W. A. became entitled absolutely to her equal proportion (one-third,) of the said principal fund as heir at law, which at her death passed under her will.

An *appeal* from a surrogate's decree of distribution must be taken in *three months* therefrom, although it does not make a final distribution of the whole estate.

Second District, Poughkeepsie General Term, May 1866.

Before SCRUGHAM, LOTT, BARNARD and GILBERT, Justices.

JAMES GILL, of the town of Poughkeepsie, in Dutchess county, died in February, 1856. He executed his will in June, 1841. He had at that time two brothers, Theophilus

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A. and Thomas, two sisters, Sarah W. Anthony and Ann Gill, living. His brother Theophilus A. Gill is not mentioned in the will.

In and by the will he gives and devises to his brother "Thomas Gill, his heirs and assigns," the one-third of his estate after payment of his debts.

The remaining two-thirds of his estate he gives to his executors in trust to pay the interest on one-third to his sister Sarah W. Anthony, during her life, and the interest on the remaining one-third to his sister Ann Gill during her life.

Upon the death of either of his said sisters, the executors were directed to pay one-half of the interest payable to her so dying, to the surviving sister during her natural life, and the other half to his brother Thomas Gill. And upon the death of the surviving sister, the whole two-thirds so held in trust were to be paid to his brother Thomas Gill. And the devise is coupled with the following declaration by the testator :

"It being my intention by this my will, that, after the said annuities shall cease to become due and payable, that the said two-thirds or remainder of my estate shall go and belong to my said brother Thomas Gill, to the exclusion of all my other brothers and relations."

Thomas Gill died before the testator, leaving John R. Gill, Robert T. Gill, Ann Gill, Elizabeth Gill and Sarah W. Gill, his children and heirs at law.

The sister Ann Gill also died before the testator, leaving no children.

On the first day of July, 1858, the executor had an accounting before the surrogate of Dutchess county, at which time a decree was made by the surrogate, directing the executor to distribute two-thirds of the amount in his hands, as follows : one equal third to Theophilus A. Gill, a brother ; one equal third to Sarah W. Anthony, a sister, and one-third to be divided, share and share alike, among the before-mentioned children of Thomas Gill.

The other one-third of said estate, amounting to \$1,978.61,

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the executor was directed to retain and invest, and to pay the interest to Sarah W. Anthony during her life, and at her death to be retained, subject to the order of the surrogate.

Sarah W. Anthony died in June, 1864, leaving a will, of which her husband, Theophilus Anthony is the executor.

On the 19th day of November, 1864, an accounting was had by Jacob Brouwer, executor, as to the fund set apart for Mrs. Sarah W. Anthony. A decree was then made, directing that the principal, less the expenses of accounting and commissions, be distributed by the executor as follows: one-half to Theophilus A. Gill, and the remaining one-half, share and share alike, among the before-mentioned children of Thomas Gill, deceased.

From this decree Theophilus Anthony, executor of and trustee under the will of Sarah W. Anthony, took an appeal, and the children of Thomas Gill took a cross appeal.

J. S. VAN CLEEF *and*

JOSEPH J. JACKSON, *counsel for appellant.*

I. By reason of the death of Thomas Gill and Ann Gill during the life of the testator, the entire estate lapsed, subject to the life estate in one-third thereof in favor of Mrs. Anthony, and became undisposed of by will. (*Williams on Executors*, 553, and cases cited; 17 N. Y. 561, 574-5; 1 *Jarman on Wills*, 310.)

II. The share directed to be invested for Mrs. Anthony, vested in the next of kin of the testator immediately upon his death, subject to the life estate in favor of Mrs. Anthony.

Where a legacy or bequest of personal property lapses, it immediately vests in the next of kin of the testator, subject to the execution of any trust capable of execution. (17 N. Y. 561, 574-5; 1 *Sand. Ch.* 119; 25 *Barb.* 134; 4 *Bradford*, 161; 1 *Paige*, 32; 1 *Jarman on Wills*, 641.)

When a future estate in remainder is in fee or absolute, it vests immediately on the death of the testator, the right of

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possession only being suspended. (24 *N. Y.* 9; 25 *Wend.* 119; 1 *Redfield*, 469; 40 *Barb.* 286.)

III. The share set apart for Mrs. Anthony being undisposed of after the termination of her life estate, she became the absolute owner of one-third thereof immediately upon the testator's death, and could have compelled the payment of such one-third to her during life, and as her absolute property it passes to her husband and executor by her will. In *Hoes agt. Van Hoesen* (1 *Barb. Ch. R.* 379, 396-7), the chancellor decided that the administrators of the widow were entitled to one-third of the undisposed personalty left by her husband, although she had enjoyed a life estate in the whole of such personalty under the will. The chancellor holding that under the statute of distributions the widow was entitled to one-third of the personalty undisposed of absolutely, immediately upon her husband's death (1 *Barb. Ch.* 379, 396).

IV. The trust in regard to the final distribution of the estate having failed, the executor held the one-third for the benefit of Mrs. Anthony, as an executor merely. (24 *N. Y.* 9, 17 18; *Dayton on Surrogates*, 451.)

V. The distribution of July 9, 1858, was made on the theory that the entire estate had lapsed except the life estate in one-third, in favor of Mrs. Anthony.

All the next of kin consented or agreed to, and acquiesced in such distribution. By such mutual acquiescence Mrs. Anthony was deprived of one-half of the interest of Ann's share during life. The children of Thomas Gill are now concluded by their implied contract, even though they had misapprehended the law.

J. S. VAN CLEEF, counsel for T. Anthony, respondent.

I. The appeal from the decree of July 1st, 1858, cannot be entertained, and should be dismissed. It was not taken within three months (3 *R. S.* 5th ed. p. 906, § 25).

The decree by its terms is a *final decree*, and the parties to it having acknowledged it as such by their receipts

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are bound by it as final in regard to the final distribution under it.

Mrs. Anthony lived more than seven years after the decree and distribution in 1858, and the decree cannot now be reviewed. (*Fols.* 54-75, 1 *Bradford* 1; 11 *Barb.* 554; 2 *Paige Ch.* 574.)

II. The surrogate had no authority to correct by the decree of 1864, any errors of the decree of 1858, if any such existed. The parties interested were all present in court in 1858. The decree as to the two-thirds then distributed, was final, and there is no pretence of fraud or mistake in regard to the facts.

"When all the parties interested are represented at the hearing, and the court has given its final sentence or decree, I know of no authority showing that these courts have ever exercised the general power of opening and reversing it again, upon the ground that they had erred as to the law, or had decided erroneously upon the facts." (*Opinion of Judge DALY in Brick's case* 15 *Abb. Pr. R.* 12, 36; *Dobke agt. McClaren*, 41 *Barb.* 491; *Sipperly agt. Baucus*, 24 *N. Y.* 46.)

III. The decree of 1858 was either a decree or not. If a decree, an appeal should have been taken within three months. If not a decree, then the parties interested in the estate must be regarded as having made a voluntary settlement, and they are bound by it. The right to have any error corrected was by action, which is now gone, seven years having elapsed before Mrs. Anthony's death.

It will hardly be contended that the surrogate in any, and especially a collateral proceeding before him, can revive a claim which is outlawed.

IV. There is no intention expressed or implied in the will that the fund in court shall go to the children of Thomas Gill, to the exclusion of the testator's brothers and sisters.

The testator first gave one-third of his estate to his brother Thomas, his heirs and assigns in contra-distinction to the qualified estates given to his sisters (*Fol.* 60). That one-third was distributed in 1858 (*Fol.* 72).

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After the estates for life ceased, he directs the payment of the rest to Thomas Gill, simply further stating "it being my intention, that after the said annuities shall cease to become due and payable, the said two-thirds or remainder of my estate should go and belong to my brother, Thomas Gill, to the exclusion of all my other brothers and relations."

It will not be denied that the children of Thomas were included among the testator's "other relations," and the court will not decree payment to nephews and neices who are not named, in preference to a sister who is made one of the objects of the testator's bounty, unless the intention of the testator to that effect is clearly and unequivocally expressed in the will.

V. The appellants could have obtained any relief to which they are entitled, upon the appeal brought by this respondent (*Sup. Court Rules, 44*), and in any event they should be charged personally with the costs of this respondent, and the respondent, Jacob Brouwer, executor, &c.

A. ANTHONY and JAMES EMOTT,
Counsel for R. T. and Sarah W. Gill.

I. The decree of November 19th, 1864, was right as to Theophilus Anthony, executor, &c., and wrong as to the children of Thomas Gill, deceased.

Theophilus Anthony, executor, &c., founds his claim to one-third of this fund of \$1,978.61 upon the assumption that the bequest to Thomas Gill *lapsed* by reason of his decease before the testator. This is not so, for two reasons.

1st. The will was of full force as to his testatrix, Sarah W. Anthony. She was given the interest of this fund for life, and the will excludes her from any other than the life estate in it. The will, by its terms, prevents the fee from vesting in her. She cannot be seized of a life estate in the whole, and at the same time of an absolute right to one-third of the principal.

2d. The terms of the will indicate an intention by the

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testator to give his whole estate to Thomas Gill, or, in case of his decease, to Thomas' heirs. This is clear, from the clauses already quoted from the will.

II. The heirs of Thomas Gill have taken their appeal to obtain the whole fund remaining in the hands of the executor, and insist that neither bequest in favor of their father lapsed by reason of his decease previous to the testator.

1. The rule formerly was strict that unless the legatee survive the testator, the legacy was extinguished. The Revised Statutes saved from its operation lineal descendants of the testator; and courts of equity, long before the statute, had controlled this rule by the manifest intention of the testator appearing upon the face of the will that the legacy should not lapse, and where the testator in the will has provided a substitute for the legatee dying in his life time. (*William's Ex'rs* 1039-40, and cases cited; *Id.* 1641-44, and cases cited.)

2. It is well established by the cases cited in the foregoing authority, that where there is a bequest to "A, or his personal representatives,"—to "A, or his heirs"—the word "or" implies a substitution, so as to prevent lapse.

The reading of this will is to "Thomas Gill, his heirs and assigns;" and this, taken with the last clause of the will, shows clearly the testator's intention to use the words "heirs and assigns," as words of substitution (*Hawes agt. Banks*, 4 *Edw.* 664).

3. The intention of the testator that the legacy should not lapse, and his substitution of persons in place of the legatee dying in his lifetime, appearing on the face of the will, is all that is requisite to entitle Thomas Gill's children to the residue of this estate.

Is not the intention clear that Thomas or his children should take the whole estate ultimately? Testator excludes all his *other* brothers and relations.

It may be insisted that the exclusion of "relations" excludes the children of Thomas. The sentence, taken as

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a whole, and in connection with the several clauses of the will, cannot bear that interpretation.

4. If the intention to prevent a lapse is apparent, in order to advance that apparent intention of the testator, "and" may be construed to be "or," and *vice versa*. This has been done in numberless cases. (*Maberey* agt. *Strode*, 3 *Vesey* 450; *Bell* agt. *Phyn*, 7 *Vesey*, 459; *Armstrong* agt. *Moran*, 1 *Bradf. Sur. R.* 314; *Van Vechten* agt. *Pearson*, 5 *Paige*, 512; *Chrystie* agt. *Phyfe*, 19 *N. Y. R.* 344.)

Here neither "and" nor "or" is inserted. Should not the court read it so as to carry out the apparent and evident intent?

5. The words "and to her heirs" have been held to intend a substitution (*Hawes* agt. *Banks*, 4 *Edw.* 664, *before cited*).

6. It may be claimed that the decree of the surrogate, in 1858, bars our claim now. We do not ask the court to compel the executor to pay over any moneys disposed of by that decree. We were bound by that decree only as to the moneys distributed under it, and the executor was directed to hold this fund of one-third of the estate, and retain it after Mrs. S. W. Anthony's decease, "subject to the order" of the surrogate. We now ask for that fund.

That accounting was not final, and bound none of the parties, save as to the funds disposed of by virtue of the order then made, in which order this present fund is directed to be held, subject to subsequent adjudication.

7. The children of Thomas Gill deceased, claim that an order should be made reversing the decree of the surrogate made November 19th, 1864, and directing the entry of a decree directing J. Brouwer, the executor, to pay the whole fund in his hand of principal, less the commission and costs and expenses of an accounting, to the heirs of Thomas Gill, deceased.

By the court, LOTT, J. The surrogate's decree of the 1st of July, 1858, makes an absolute disposition of all the estate of James Gill, deceased, except the principal of the fund

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directed to be retained and invested by the executor for the benefit of Sarah Wilhelmina Anthony during her natural life. That fund was to abide the further order of the court, and was invested under the third provision of the will of said deceased, to produce the annuity given to Mrs. Anthony, and if Thomas Gill, the brother of the testator, had survived him he would have been entitled to the whole of the principal, to the exclusion of all the other brothers and relations of the testator, but as he died before the testator and no other disposition was made thereof by the will, it lapsed and became distributable among the testator's next of kin, under the statute of distributions, as in cases of intestacy as a vested estate. The payment thereof was however postponed till the death of Mrs. Anthony, who, as before stated, was to receive the income of the whole during her natural life. She as one of the sisters of the testator was entitled to one third of the fund, and upon her death it passed under her will. The surrogate's further decree of 19th November, 1864, directing one half of the entire fund, after payment of certain expenses, to be paid to Theophilus Gill, and the other half to the children of Thomas Gill, was therefore erroneous.

There is, in our opinion, no ground for the claim of the children of Thomas Gill to the whole of that fund. The testator evidently made the bequest thereof under his will to his brother Thomas in the expectation that his brother would have survived him, and he made no provision for the event that has occurred. There is no reference in that bequest to the heirs or children of Thomas, nor is there any indication whatever that they should take what was intended for their father.

The provision for the exclusion of the other brothers and relations of the testator from participation in the fund was clearly based on the assumption that Thomas would have survived the testator, and taken it himself, and became inapplicable and inoperative when the intended disposition of it failed.

These views lead us to the conclusion that the surrogate's

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decree of November 19th, 1864, must be modified, so as to direct one-third of the fund in question to be paid to Theophilus Anthony, the executor of the will of Mrs. Anthony, one-third to Theophilus A. Gill, and the balance to the children of Thomas Gill in equal shares, after first paying thereout the costs of the said executor, and of Jacob Brouwer the executor, &c., of James Gill deceased.

The children of Thomas Gill have also appealed from the decree of 1st of July, 1858. It appears that on the 9th of the same month they received the distributive shares payable to them under it, and gave receipts in full therefor to the executor, they acquiesced in its provisions and did not appeal therefrom until the subsequent decree of 19th November, 1864, was made. This appeal was too late. It could not be taken after three months from its entry (*See 2 R. S. p. 609, §§ 105-107*).

That appeal must therefore be dismissed with costs.

SUPREME COURT.

WILLIAM GAUNTLEY agt. ELIJAH WHEELER, JR., and CORNELIUS BROWN.

In an action upon an *undertaking*, given by the defendant to the plaintiff, pursuant to sections 186 and 187 of the Code, to procure a discharge from arrest, the *complaint* is defective in showing a cause of action where it omits to aver the fact substantially :

- 1st. That an execution against the *property* of the defendant has been issued to the sheriff of the county, in which such defendant was originally arrested, and that the same has been returned by such sheriff unsatisfied in whole or in part.
- 2nd. That an execution against the *body* of the defendant, having at least fifteen days between the teste and return thereof, has been issued to the same sheriff; and by him returned that the defendant cannot be found within his county.

Since the form of an action of debt on the recognizance no longer exists, and the plaintiff is required to set forth in his complaint, every fact which the plaintiff must prove to enable him to maintain his action, and which the defendant has a right to controvert in his answer, it seems necessarily to follow that the above statutory facts should be stated in the complaint.

Sixth District, Cortland Special Term, August, 1865.

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DEMURRER to Complaint.

WATERS & WATERS, *attorneys for plaintiff.*

BALLARD & WARREN, *attorneys for defendants.*

PARKER, J. This action is brought upon an undertaking, given by the defendants to the plaintiff, pursuant to sections 186 and 187 of the Code, to procure the discharge from arrest of one William Carroll, held by the sheriff of the county of Cortland, under an order of arrest in a civil action, brought against him by the above plaintiff.

The complaint alleges judgment in an action in favor of the plaintiff against the said Carroll ; that an execution was issued thereon against the person of the defendant, and that the sheriff has made return that he could not be found, but omits to state that the execution was issued to the sheriff of the county in which the defendant was originally arrested, and also omits to allege that an execution against the property of the defendant had been issued to the same sheriff.

The defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and the question raised by the demurrer is, whether it was necessary to state the facts omitted as above mentioned.

By section 31 of the article of the Revised Statutes entitled, "of bail and proceedings to charge and exonerate them" (2 *R. S.* 382, 1st edition), it is enacted as follows: "The plaintiff in the action shall not be entitled to bring any suit on the recognizance of bail until 1st: an execution against the property of the defendant shall have been issued to the sheriff of the county in which such defendant was originally arrested, and the same shall have been returned by such sheriff unsatisfied in whole or in part; and 2nd: an execution against the body of the defendant having at least fifteen days between the teste and return thereof, shall have been issued to the same sheriff, and by him returned, that the defendant cannot be found within his county." The defendant's counsel insists that this statute is still in force; and

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that it was necessary to allege in the complaint that what it so requires, had been done.

I have no doubt that these provisions of the statute are still in force under section 471 of the Code, as not inconsistent with the Code, and in substance applicable to any action which can be brought upon the undertaking provided for in section 187, and I am unable to avoid the conclusion that the facts omitted from the complaint, as above stated, are necessary to show a cause of action.

The present system of pleading requires the plaintiff in his complaint to set forth the facts constituting his cause of action ; that is, "every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer" (3 *Seld.* 478). I know that this complaint is in accordance with the form reported to the legislature by the commissioners of the Code, and adopted by Tiffany & Smith in their "*New York Practice*," volume 3, page 69. The case of *Renick* agt. *Orser* (4 *Bosw.* 389), is referred to, both in the report and in the practice, as showing that the statement of the execution against property is not necessary. That was an action against the sheriff for an escape, and shows merely that an execution against the body is not void by reason of the want of a previous execution against property, but only irregular ; and hence that the sheriff could not take advantage of the want of such execution against property. But the case here is very different. The statute makes the execution against property as essential to the plaintiff's right of action as the execution against the body, and that this was issued, this complaint in pursuance of the form from which it was taken avers. Then section thirty-three, of the article of the Revised Statutes above referred to, provides that "in such action against bail, they may plead that execution against the property and against the body of the defendant in the original suit were not issued as herein directed," and hence it is argued that the statute did not contemplate that these facts should be alleged by the plaintiff, and in the old form of pleading, when the action was debt on the recognizance, it

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was not necessary to allege the issuing of either execution in the declaration.

The recognizance was set forth and the breach merely, and hence the necessity of the statutory provision, that the omission mentioned might be pleaded by the bail; they were, however, matters not of practice but of pleading; and now, since the form of an action of debt on the recognizance no longer exists, and the plaintiff is required to set forth in his complaint every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, it seems to me necessarily to follow that not only the fact of the issuing of the execution against the body, but also the other fact equally required by the statute, of the issuing of an execution against the property of the defendant should be averred in the complaint.

The demurrer I think is well taken, and must be sustained, with liberty to the plaintiff to amend his complaint upon payment of costs.

COURT OF APPEALS.

FRANCIS FERRIS, plaintiff in error agt. THE PEOPLE, defendants in error.

The act of 1859 authorizes the *court of general sessions* in the city and county of New York, to continue in session beyond the *third week* from its commencement, which was the original limit established by law.

Sanity is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecution to give *affirmative evidence* that such state exists in a particular case.

Where an *irregularity* occurs in the *drawing of a panel of jurors* for a court of general sessions, which works no injury or prejudice to a defendant who is tried and convicted by such jury, a new trial will not be granted on the ground of such irregularity.

March Term, 1866.

WRIT OF ERROR to the court of general sessions of the city and county of New York, on behalf of the plaintiff in error.

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WILLIAM F. KINTZING, JR., *and*
JOHN ANTHON, *for plaintiff in error.*
A. OAKLEY HALL, *for defendants in error.*

DAVIES, C. J. The plaintiff in error was indicted and tried in the court of general sessions in and for the city and county of New York, and convicted of murder in the first degree, and sentenced to death. The conviction was affirmed in the supreme court, and the prisoner has brought his writ of error to this court. Three points or grounds are presented and urged for a reversal of the judgment:

1st. That the trial, verdict and judgment are shown by the record to have been had after the expiration of the third week of the term of the general sessions, which, it is claimed was the legal limit of the sitting of the court, unless a continuance of the term had been entered on the record, or upon the minutes of the court, and which it is assumed was not done, as it does not appear by the records to have been done.

2d. That the court erred in overruling the challenge by the prisoner to the array.

3d. That there was error in the charge of the court to the jury, on the subject of insanity.

By the third section of the act to enlarge the jurisdiction of the court of general sessions in and for the city and county of New York (*Laws of 1855, ch. 337*), it is declared that the appellate court, before which a writ of error may be brought, may order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below.

The provisions of this act make it, therefore, the imperative duty of this court, in a case like the present, to examine carefully the whole record, and if satisfied that the verdict is against the evidence, or not authorized by law, or if it shall be of opinion that justice requires a new trial, then the same shall be granted, whether or not any exceptions

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shall have been taken in the court below. The whole case is, therefore, to be considered as *res nova*, and the judgment is to be affirmed or reversed, as the court shall be of opinion whether or not substantial justice has been done. The clear intent of this statute is, to impose on the appellate court a disregard of technicalities and irregularities, not working any prejudice to the prisoner, and decide the case according to justice and the very right of the matter. Bearing in mind these cardinal principles, we find on examination of the evidence contained in the record, a clear case of taking human life with premeditated design, without authority of law, and under such circumstances as do not render the act excusable; and such taking of life, the statutes of this state declare is murder in the first degree. Of this crime the prisoner has been convicted by a verdict of the jury, and if no error has intervened on the trial prejudicial to the accused, it is our duty to affirm the judgment rendered upon such conviction.

It is not, and could not be well urged, that the verdict is against the weight of evidence. The testimony is all on the side of the prosecution, except a single witness, whose evidence will be hereafter adverted to, and the jury were fully warranted in rendering the verdict given.

There remains to be considered the objections now urged, why the judgment should be reversed, and they will be examined in the order above stated: 1st. Was there any fatal irregularity to the continuance of the term of the general sessions beyond the three weeks originally limited for its sittings.

Under the revised laws it was not lawful for the general sessions to sit longer than two weeks (2 *R. L.* 1813, p. 503, § 8). The Revised Statutes authorized that court to sit three weeks (2 *Stat. at Large*, p. 526, § 31), and by a special law passed in 1846 (*Laws of 1846*, ch. 21), it was provided that whenever the trial of a cause should have been commenced in that court, "and the same shall not be concluded before the expiration of the term of that court, it shall be lawful for the said court to continue in session until the conclusion

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of said trial, and to proceed to judgment, if they shall so deem necessary, in cases where conviction shall be had."

In 1859 (*Laws of 1859, chap. 208*), an act was passed which declared, that it should be lawful for the court of sessions of any county of this state to continue its sittings at any term thereof so long as it may be necessary in the opinion of such court for the dispatch of any business, or the determination of any cases that may be pending before such court. It appears by the record in this case that the term of the general sessions for the city and county of New York commenced on the first Monday of February, 1865, and that the prisoner was tried on the 18th day of said month. As the first Monday of February in that year was the sixth day of that month, it follows that the present trial was not commenced until the expiration of the third week of said term. If the court of general sessions of the city and county of New York is embraced within the provisions of the act of 1859, then the court could lawfully try the prisoner, although the trial was not commenced until after the expiration of the third week of the term. This precise point arose and was discussed in the case of *Lowenburgh agt. The People* (27 N. Y. 336), and as the conviction in that case was affirmed, the power of the court of general sessions to sit beyond the third week, and applicability of the act of 1859, to the court of general session of New York, must be deemed also to have been affirmed. It was said in the leading opinion in that case, that "a court of general sessions of the peace and a court of sessions of any county, are one and the same tribunal." It is the criminal court of the county, whether held by the same or different magistrates (*People agt. Powell*, 14 *Abbott's Rep.* 91). I am, therefore, of opinion that the act of 1859 authorized the court of general sessions of the city and county of New York to continue in session until it passed sentence upon the prisoner in this case. That period was beyond the three weeks limited by law. It may be safely asserted that all the judges concurred in this view of the application of the law of 1859. We must, there-

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fore, hold that the term of the general sessions was lawfully continued beyond the third week from its commencement.

Was there testimony on the trial which warranted or in any aspect sustained the defence of insanity? The only witness called to establish that defence, testified on the direct examination, that on the afternoon of the homicide, and before it was committed, he saw the prisoner on the sidewalk, on the top of the stoop sitting down. That he had a knife in one hand, and was sharpening it on the edge, on a stone. The witness was then asked, "did you notice anything peculiar about him that attracted your attention?" He answered, "I noticed some kind of madness, or a kind of rolling of the eyes, as if he was having some words with somebody." The witness spoke to him and asked him where he had been. On his cross-examination he was asked, "you noticed a kind of rolling of the eyes?" He replied: "Yes, sir, that is what I noticed, as if he was cross or having some words with somebody." He was then asked, "at that time did you think he was insane?" He answered, "no! I would not like to say that." He was then asked, "did the idea enter your head that he was insane?" He replied, "no, sir! I did not regard him as an insane man." The physician to the city prison testified, that he had never seen in the prisoner the slightest evidence of insanity. This evidence wholly failed to lay any foundation for the defence of insanity. It may be said in this case, as was said in that of *Walter agt. The People* (32 N. Y. 147): "There was not a particle of evidence in this case showing the prisoner to be insane when he committed the homicide. The defence of insanity failed utterly. Hence the legal proposition asked to be given to the jury was of the most abstract character, and for this reason the judge was not called upon to say anything about it. Sanity is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecution to give affirmative evidence that such state exists in a particular case."

What the learned recorder did say on the subject of insanity, although wholly inappropriate to the case under

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consideration, was unexceptionable, and fully sustained by authority and medical authors. The prisoner suffered no prejudice therefrom.

It remains to consider the challenge to the array. It must be conceded that the most culpable irregularities existed in reference to the drawing of the additional panel of jurors ordered by the court. The officers, whose duty it was to attend such drawing, were clearly guilty of a great neglect of their duty, and doubtless are liable to punishment therefor. The question still arises, whether any injury has resulted to the prisoner, or has he been prejudiced thereby. If we could see that by any possibility this neglect of duty on the part of those officers could have changed the panels, or in any manner have produced any different result, we might hesitate whether the prisoner should not have a new trial. It is apparent from the statutes that the officers enumerated were but to be silent spectators to the drawing of the names of the jurors from the jury box. Their presence would not and could not have changed a name drawn, and their authentication of the drawing, although required by the statute, is of little moment, if the names actually drawn were those returned on the panel. It is not alleged that this was not so, and the subsequent certificate of the drawing attested what had actually occurred, except as to the fact of the presence of the signers at the time the drawing took place.

It does not seem to me that this circumstance, resulting as it undeniably did in no injury or prejudice to the prisoner, is sufficient, in view of our duty under the act of 1855, in reviewing trials in the New York general sessions, to warrant us in granting a new trial. The case appears to have been carefully tried, the testimony was clear and conclusive to establish the guilt of the prisoner, and every privilege which the law secures to him would appear to have been extended to him. No sufficient reasons have been suggested for a reversal of the judgment, and it should, therefore, be affirmed, and as the time fixed for the execution of the sen-

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tence has passed, the proceedings will be remitted to the supreme court, to the end that it may direct the sentence to be executed according to law (*People agt. Willis*, 32 N. Y. 723).

COURT OF APPEALS.

ALBERT COTES and another, Executors, &c., respondents, agt. ANDREW R. SMITH, MINERVA E. WOOD, LOUISA LYMAN, and CALVIN P. SMITH, appellants, and LAURA CARROLL, JANE M. RATHBUN and GEORGE L. RATHBUN, by, &c., respondents.

An order of the general term of the supreme court striking a cause from the calendar on motion of adverse defendants, against whom no appeal from the judgment of the special term had been taken, is not appealable to this court. So with an order affirming the special term, denying a motion to set aside a judgment for alleged irregularity. *It seems* the orders below were properly made. This court will not on appeal against the plaintiffs in an action review the judgment below, so far as it affects adverse defendants against whom no appeal was taken from the special to the general term.

June Term, 1866.

THIS action was commenced by the plaintiffs, two of the executors of Benjamin Rathbun, to obtain a judicial construction of his will.

The defendants, Laura, Jane M. and George L., appeared by Countryman & Moak, and the defendants, Andrew R., Minerva E., Calvin P., and Louisa, by D. C. Bates, Esq.

The case was tried before Mr. Justice MASON, at the Otsego special term, in July, 1861. All parties appeared on the trial by their respective attorneys. The principal questions litigated were: 1st. Whether the defendant, George L., under the *second* and *third* clauses of the will, on arriving at twenty-one years of age, took the accumulated rents of the farm called the Wheeler farm; and, 2d. Whether the defendants, Laura and Jane M., were entitled to the interest on \$2,000 bequeathed to each by the *third* clause, invested on interest by the plaintiffs. The defendants represented by

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Mr. Bates claimed the rents and such interest went into the residuum. The court held that George L. took the rents, and Laura and Jane M. were entitled to such interest. Judgment was perfected in Otsego county clerk's office accordingly, February 5, 1864.

The finding of facts and judgment roll were filed by plaintiffs, February 5, 1864, and judgment entered in judgment book same day by clerk. At that time Countryman & Moak had an order pursuant to rule 62 of the supreme court, allowing Mr. Moak, as guardian of the defendant, George L., \$100 to be paid out of the accumulated rents awarded by the judgment to said defendant, George, which they had not filed in the clerk's office. When the judgment was entered, February 5, it contained blanks for the insertion of the costs of the different parties. February 6, plaintiffs served copy judgment on each set of defendants, and also a copy of their costs with notice that they would be readjusted, March 17. February 9, Countryman & Moak filed the order making allowance to guardian, when the clerk annexed a copy of the order to judgment roll. March 12, defendants, who appeared by Countryman & Moak, served a copy of their costs on plaintiffs with notice they would be adjusted March 17, and the clerk on the latter day, readjusted plaintiffs' costs, taxed costs of Countryman & Moak, and inserted the amount in the blank left therefor in entry of judgment, and also inserted directions as to payment of the \$100, to guardian, out of accumulated rents and profits adjudged to his ward. February 27, defendants who appeared by Mr. Bates, appealed as against the plaintiffs, but not as against the other defendants, and they had no knowledge or intimation of such appeal until long after April 13. April 13, 1864, Countryman & Moak served a copy of the judgment and notice of entry thereof on Mr. Bates.

He did not appeal as against Countryman & Moak, but printed the case with judgment roll as it was, March 17, and eight days before November general term, 1864, served upon them and the plaintiffs copy of such case, with notice of argument thereof. Countryman & Moak moved at that term

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to strike the cause from the calendar as to their clients. Mr. Bates moved for leave to appeal as against them. The question of right to allow an appeal was argued, and at January general term, 1865, the court struck the cause from the calendar, and denied leave to appeal (*See 28 How. 436*).

The order of the court was entered February 1, 1865, and a copy thereof, with notice of its entry served upon the attorney for the appellants same day.

At Owego special term in March, 1865, appellant's attorney made a motion to set aside the judgment, and for leave to appeal. The court, on its hearing, denied the motion to set aside the judgment absolutely, and refused leave to appeal, on the ground that it possessed no power, and also that that branch of the motion was *res adjudicata*. The appellants brought an appeal from that order to the general term of the supreme court, where it was affirmed (*29 How. 326*).

The order of affirmance was entered July 17, 1865, and on the 18th a copy with a notice of its entry, was served on appellants' attorney. No notice of appeal to the general term of the supreme court from the judgment of the special term of that court has ever been served on respondents, Laura, Jane M. or George L., or their attorneys, nor have they been heard on any such appeal, nor has any case or exceptions been served upon or settled as against them.

No general term of the supreme court has made any order or judgment affirming, reversing or modifying the judgment of the special term as against them, or in any manner affecting their rights as determined by the special term.

The appeal by the appellants *against the plaintiffs*, was brought on and affirmed as against them.

On the 4th of December, 1865, the appellants served a notice of appeal from that judgment and the orders of the general term on all the respondents' attorneys for Laura, Jane M., and George L., who move to dismiss the appeal as against them.

N. C. MOAK, *for motion*.

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I. These respondents having, after proper notice and hearing, established their rights by judgment, they could not be changed except by an appeal to which they were parties, with a right to be legally heard, and to appeal to this court if dissatisfied with the decision of the general term. (1 *Barb. Ch. Rep.* 624; 28 *How.* 446, MASON, J.; 28 *How.* 448, BALCOM, J.; 28 *How.* 438-9.)

II. No appeal lies against these respondents from the judgment of the general term. Their rights depend upon that of the special term. They claim nothing under that of the general term, and not having been parties to it, are not, and could not be affected by it. It does not, and could not pass or attempt to pass upon their rights. As between the appellants and these respondents there is no judgment of a general term, and unless there is as against them, the judgment of the special term is not reviewable here. (6 *How. Pr. Rep.* 280; 3 *Denio*, 609; 1 *N. Y. Rep.* 228; 2 *Id.* 188; 6 *How. Pr. Rep.* 240; 15 *N. Y. Rep.* 593.)

III. The order of the general term, denying leave to appeal, did not involve the merits and is not appealable to this court. (27 *N. Y. Rep.* 638; 5 *N. Y. Rep.* [1 *Seld.*] 547; 16 *Abb. Pr. Rep.* 126.)

IV. Nor is the order refusing to set aside the judgment on the ground of irregularity appealable, conceding there was one. This would be a mere matter of practice which this court cannot review. (29 *N. Y. Rep.* 637; 2 *Id.* 186; 18 *Id.* 150; 16 *Id.* 242; 27 *Id.* 216; 17 *Id.* 72; 3 *How. Pr. Rep.* 425.)

V. Neither of the orders changes the form or substance of the judgment, nor does either affect the merits of the controversy (13 *N. Y. Rep.* 597-8). Neither is "an intermediate order involving the merits, and necessarily affecting the judgment." (29 *N. Y. Rep.* 637; 32 *Id.* 482.)

The power to review an order in such a case is incident to a right to examine the judgment therein on appeal from that (*Code*, § 11, *Sub.* 1). The principal is here wanting, and the incident cannot exist without it.

VI. Neither of the orders was a final order affecting a sub-

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stantial right, made on a summary application after judgment, within subdivision three, of section eleven of the Code: "If any question of practice can be settled in this court by adjudication, this is one." It was decided in *Sherman* agt. *Felt* (3 *How. Pr.* 425), that that provision did not refer to an ordinary motion to set aside proceedings for irregularity, or as a matter of favor, but that it referred to an application assuming the validity of the judgment, and based upon it, which itself might terminate in a final order in the nature of a judgment, such as an application for surplus moneys upon a sale in a foreclosure suit, or for an order of sale for nonpayment of installment becoming due subsequent to the judgment. The same construction was given to that section of the Code in *Dunlop* agt. *Edwards* (3 *Comst.* 341); *Humphrey* agt. *Chamberlain* (1 *Kern.* 274); and *Jones* agt. *Derby* (16 *N. Y.* 242); PRATT, J., in *Bank* agt. *Spencer* (18 *N. Y. Rep.* 152; *Id.* 154). (See also 29 *N. Y. Rep.* 637; 28 *How.* 471; and cases cited under point V, *supra*.)

D. C. BATES, *for appellants.*

I. The parties to the action are properly before this court. The respondents defendants, making this motion, are the same persons who made the motion at general term to strike the cause from the calendar. The appellants ask now to have that order reviewed on the appeal from the judgment in the cause.

The attorneys making this motion, have included in the grounds of their notice, the identical points included in the appeal from the order striking the cause from the calendar, at general term. The appellants claim, that they have the right to argue those questions of merit and substance, on the hearing of their general appeal, instead of arguing them on the hearing of this motion.

II. The notice of appeal does not bring three distinct appeals. It simply brings an appeal from the judgment in the cause, and points out plainly and distinctly to the parties concerned, what orders included in the judgment-roll, the

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appellants expect to have reviewed. It has been decided, or at least, the decision has been published, since this appeal was brought "that it is not material whether the orders are mentioned in the notice of appeal or not. That they are reviewable on the appeal from the judgment" (*Selden agt. The Del. & Hud. Canal Co.* 29 N. Y. 634, 637).

But the mere fact of noticing the orders as appealed from in the general notice of appeal, does not thereby make three separate appeals.

III. The undertaking is sufficient. There is but one judgment, and but one judgment record. The orders appealed from are included therein, and made a part thereof. The undertaking recites the rendering of the judgment; the making and rendering of each of the orders; is conditioned to pay all costs and damages which may be awarded on said appeal against them, and also to pay, in event of the judgment or either of the orders being affirmed or the appeal dismissed, the amount directed to be paid by the said judgment; and the sureties therein justify in the sum of five thousand dollars each.

"Where two different sums of money were adjudged to different defendants, but only one record made, and the plaintiff appealed to this court: *held*, that only one undertaking to pay costs and damages on the appeal, in the sum of \$250 was necessary." (*Smith agt. Lynes, et al.* 2 Comst. 569; *S. C.* 4 How. 209.)

Even if it were defective, the appellants could amend on terms (*Shermerhorn agt. Anderson*, 1 Comst. 430).

IV. The time to appeal from the orders is precisely the same as the time to appeal from the judgment. Code section 331. To confine the appellant in an action to orders which might happen to have been entered, and notice thereof served, within sixty days next preceding the entry of a judgment directed at general term, would work the grossest injustice.

This very point was decided by the court for the correction of errors.

"An appeal from a final decree in a case, opens for the

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consideration of this court, all prior or interlocutory orders or decrees, in any way connected with the merits of the final decree." (*Jaques* agt. *M. E. Church*, 17 *Johns.* 548; *To the same effect*, *Le Gour* agt. *Gouverneur et al.* 1 *Johns. Cas.* 436, 498.)

V. The orders are reviewable.

They are "intermediate orders involving the merits and necessarily affecting the judgment."

Whether an order "involves the merits" or not, is a question often difficult to answer. The line will, however, be found to run between such as dispose of the rights of parties, and such as merely regulate the course of proceeding. The court for the correction of errors had occasion to pass upon this question; and the above distinction will be found to run through all their reported cases. (*McVickar* agt. *Wolcott*, 4 *Johns.* 510; *Beach* agt. *Fulton Bank*, 2 *Wend.* 225; *Tripp* agt. *Cook*, 26 *Wend.* 143, 150, 154.)

So also the court of chancery. (*McCredie* agt. *Senior*, 4 *Paige*, 378; *Rogers* agt. *Patterson*, 4 *Paige*, 450.)

Judge EDMONDS, in *Cruger* agt. *Douglass* (8 *Barb.* 81, 86), held it a general rule (after reviewing these authorities), "that as all orders in the progress of a cause, necessarily in some degree affect the merits, so all are the subject of an appeal, unless they relate merely to matters of practice and procedure, or next in distinction."

In *Cowles et al.* agt. *Cowles* (9 *How.* 361), Justice MARVIN held that by section 329 of the Code, an order striking out a portion of an answer was an order "involving the merits and necessarily affecting the judgment," and as such reviewable on appeal from the final judgment.

In *Humphery* agt. *Chamberlain* (1 *Kern.* 274, 276), DENIO, J., held that although an order setting aside a judgment for irregularity was not appealable under subdivision 3, section 11 of the Code, yet it was reviewable under the first subdivision of that section.

This case is the one at bar. The second order which the appellants ask to have reviewed, is one refusing to set aside a judgment.

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In *Bates* agt. *Voorhees* (20 N. Y. 525), the court held that an order dismissing an appeal from a judgment at special term, was appealable.

In *The People* agt. *N. Y. C. R. R. Co.* (29 N. Y. 418, 423), an order dismissing an appeal, made by the general term from an order of the special term, granting an extra allowance of costs, was reversed on the ground that it was an order involving the merits and necessarily affecting the judgment.

So this court also holds in respect to costs in general (*People* agt. *Lumley*, 28 How. 470).

But if all these different orders before mentioned are reviewable here, then how much greater weight does the case at bar present?

Here is an order striking from the calendar the appeal at general term. The very merits of the controversy are involved in the order itself, and the judgment is necessarily affected to the extent that, if the order is law, the appellants are deprived of their substantial rights.

J. E. DEWEY, *for plaintiffs.*

By the court, JAMES C. SMITH, J. As the merits of the motion in the court below have been fully discussed in the printed briefs submitted to us, and the disposition to be made of the orders appealed from, will necessarily affect the appeal from the judgment, I propose to consider the orders on their merits, instead of passing upon the motion to dismiss the appeals.

The motion to set aside the judgment for irregularity was properly denied; there was no irregularity in procuring the costs to be adjusted after the entry of judgment, and the amount thereof inserted by the clerk in blanks left for that purpose in the judgment. The practice is authorized by the Code (§ 311).

The order allowing \$100 to the guardian of George L. Rathbun, does not affect the appellants, and they cannot question its regularity. It directs the allowance to be paid

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out of a fund belonging to the infant, and he and the guardian are the only persons interested in it. If the practice pursued in obtaining the order and inserting it, and the amount of costs in the judgment had been irregular, as the appellants insist, such irregularity would not have impaired the judgment which was otherwise valid.

The court properly refused to set aside the judgment, in order to give the party further time to appeal.

The motion to strike the cause from the calendar, was properly granted, for the reason that the interests of the defendants, in whose behalf the motion was made, were adverse to those of the appellants, and they were entitled to notice of the appeal (*Code* § 327.)

But a majority of the members of the court are of opinion that the appeals from the orders should be dismissed, on the ground that the orders were made after judgment, relate to matters of practice, and are not appealable to this court.

It results, therefore, that the only questions raised by the appeal from the judgment, are those existing between the appellants and the plaintiffs, and in respect to them no error is alleged. Consequently, the question whether Laura and Jane are entitled to interest on their legacies, and George is entitled to the rents, are not before us.

The appeals from the orders should be dismissed, and the judgment affirmed.

Ordered accordingly.

SUPREME COURT.

RONALD MACDONELL, respondent agt. WHEELER BUFFUM,
appellant.

A justice of the peace in making a return to an appeal, acts ministerially. And he is liable for a false return to an appeal for any damages which a party to such appeal may sustain.

Where competent evidence is offered on the trial, and rejected by the justice ; and at the time the justice makes his return, or amended return on appeal, he recollects the fact, or by a proper effort to refresh his memory, he can bring

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the facts to his recollection ; and if he intentionally omits or neglects to use such effort, with a design on his part to prevent a reversal of the judgment, and wholly neglects to return such fact, he is liable in an action of damages for a *false return*, to the whole amount of damages which the appellant may show he has sustained in consequence of such false return.

The justice in such action cannot sustain his defence, that his ruling, rejecting the evidence, if actually made, was right under the pleadings ; that such evidence was not receivable under a *denial* answer ; that it was *new matter*, and should have been pleaded ; where it is shown that the action tried before him was one for carelessly and negligently running against the plaintiff's wagon, and injuring it to his damage of \$50, the defendant's answer being a *denial* merely ; and the evidence offered by the defendant and rejected by the justice, tended to show that the *negligence on the part of the plaintiff contributed to the injury*.

This evidence should have been received under the denial answer, as it tended to prove that the plaintiff had no cause of action ; consequently it was not necessary to set it up and plead it as new matter.

Argued February General Term 1864, and decided at Erie General Term, May, 1864.

Before DAVIS, P. J., MARVIN, DANIELS and GROVER, Justices.

APPEAL from judgment upon verdict, and also from order of special term denying motion for a new trial.

The action is for damages for a false return made by the defendant, a justice of the peace, in an action wherein one Nathan Francis was plaintiff, and MacDonell (the present plaintiff) was defendant.

Upon the trial of this cause, the record in the action of Francis against MacDonell was put in evidence, from which it appeared that the cause of action therein alleged was that the defendant, MacDonell, in September, 1858, at or near the fair ground in Erie county, ran against the plaintiff's buggy in a careless and negligent manner, thereby breaking and marring it to the plaintiff's damage of \$50. The answer was denial.

The cause was tried in the justice's court, and judgment was rendered against the defendant, MacDonell, for damages and costs, \$11. The defendant appealed to the county court. The justice, Buffum, made his return to the court. Upon the application of MacDonell, the appellant, the county court made an order requiring a further return and statement as to certain matters and subjects specified. The substance of the eighth specification was whether the defend-

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ant's counsel offered to prove by one Hambleton that by the rules and regulations of the society (agricultural), the enclosures or track spoken of by plaintiff's witnesses, was set apart for the exhibition of horses entered for premiums; that defendant's horse and buggy, as such, were regularly and duly entered for premiums on the track, and that at the time the injury occurred, the plaintiff was a trespasser within said enclosure. *Ninth*, whether the plaintiff's counsel objected to the offer, and the grounds of the objection, and whether or not the court sustained such objection, and refused to admit such testimony. *Tenth*, whether the defendant did not offer to prove that by reason of the plaintiff's negligence and carelessness, the plaintiff's buggy came in collision with the defendant's buggy, and injured it to the extent of \$25. *Eleventh*, whether the plaintiff's counsel objected to the offer and the grounds of the objection, and whether the court sustained such objection, and refused to admit the testimony.

The justice (the present defendant) made a further and amended return, and as to the eighth specification stated, there is no record in my minutes of an objection to anything offered to be proved by the witness Hambleton by the defendant, nor have I any recollection of any such offer or objection as that mentioned. To the *tenth*, I have no recollection of any such offer or objection, and have no record of such an offer or objection. To the *eleventh*, I have no recollection or record relating to the testimony of Hambleton, except what was formerly returned by me.

The county court made a second order that the justice return definitely and specifically to the interrogations eighth, ninth, tenth and eleventh, repeating them, contained in the first order.

The justice returned to the eighth, that he had no recollection that any such offer was made by the attorney for the appellant on the trial; that he had no such offer specified in his minutes of the trial; and that he could not amend or return to the interrogatory more specifically than he had done. To the ninth interrogatory, he stated that he did not

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recollect that the offer was made ; that he could not state that there was any objection made thereto. To the tenth and eleventh ; that the counsel for the defendant did not make the offer stated in the tenth interrogatory, and consequently no objection could have been made thereto.

The county court reversed the judgment, and the plaintiff appealed to the supreme court, which reversed the judgment of the county court, and affirmed the judgment of the justice.

The testimony upon this trial proved, or tended to prove, that an offer was made by the defendant in the justice's court to prove by Hambleton, that by the rules and regulations of the society, the enclosure spoken of by the plaintiff's witnesses, was set apart for the exhibition of horses entered for premiums ; that the defendant's horse and buggy, as such, were regularly entered for premiums on the track ; and that at the time the injury occurred, the plaintiff was a trespasser on the track within such enclosure ; that this evidence was objected to by the plaintiff's attorney, on the ground that it was immaterial and incompetent under the pleadings, and that if plaintiff was a trespasser, it did not justify the defendant in injuring the plaintiff's buggy ; and that the objection was sustained by the justice.

Also, that the defendant in such trial before the justice, offered to prove that by reason of the plaintiff's neglect and carelessness at the time spoken of, the plaintiff's buggy came in collision with defendant's buggy, and injured it to the extent of \$25 ; that this was objected to, and the objection was sustained by the justice.

On the part of the defendant, evidence was given tending to prove the contrary, or modifying the character of the offers, and tending to prove that the justice made no decision thereon. The justice, the defendant in this case, was a witness in his own behalf, and his evidence tended to prove that he did not understand that such offers, or either of them, were made, and if made, that he was not called upon to make any ruling, and that he did not rule ; that he kept minutes, but they did not show any such offer ; that he returned everything on his minutes, and all that took place as he understood

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it according to the best of his recollection ; that he did not intend to omit anything, and did not omit anything that he could recollect ; he was 62 years old ; he had assistance in making all the returns.

The charge was, that if the offer to prove that the plaintiff in the former action was a trespasser, was made as stated in the offer as testified to by Whitney, and the justice recollected at the time he made his original return, or either of the amended returns, that such offer had been made and ruled upon, and rejected by him ; or, if he could have brought it to his recollection by the use of proper effort to refresh his memory, which effort he intentionally omitted and neglected to use, after his attention had been specially called to it by the orders or affidavits served on him, with a design on his part, to prevent a reversal, or secure an affirmance of his judgment, the plaintiff is entitled to recover, and the amount should be \$171.68. The defendant excepted as to the right to recover, and also as to the amount.

The court also charged, that in determining the question whether such offer had been made, they were at liberty to consider whether the offer to prove that Francis by his negligence at the time of the injury complained of, injured the defendant's buggy, although that of itself would not be sufficient to enable the plaintiff to maintain this action ; that if the jury should find that that offer was made, it would be a circumstance proper for their consideration in determining whether the other offer had been made. This was excepted to.

The judge further stated that the evidence tended, in his opinion, very strongly to prove that the offer was made, and if that was the only question, he should feel bound to direct a verdict for the plaintiff. To this the defendant excepted.

The defendant's counsel requested the court to charge that the evidence embraced in the first offer was incompetent under the answer. Refusal and exception. Also, that the evidence so offered was immaterial. Refusal and exception.

There are several other requests to charge, most of which

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are noticed in the opinion. There was a verdict for the plaintiff for \$171.68.

HUMPHREY & PARSONS, *for defendant, appellant.*

GEO. W. COTHRAN *and*

ALLAN MACDONELL, *for plaintiff, respondent.*

I. A justice of the peace in making a return to an appeal acts ministerially (*Houghton agt. Swarthout*, 1 *Denio*, 589).

II. To entitle the plaintiff to recover, it was only necessary to show that the return of the justice was false in some material respect.

The evidence which was offered and excluded by the justice, and which he refused to return, was very material. It would have established a complete defense to the action, for it would have shown MacDonell rightfully inside the track of the agricultural grounds—having entered his horse and buggy for premiums—and Francis a trespasser there, and that his own negligence and misconduct contributed directly to the injury he sustained (*Munger agt. Tonawanda R. R. Co.* 4 *N. Y.* 349). This was competent under a general denial (*Same authority*).

III. The rule of damages adopted by the court was the correct one ; to wit, the amount of the judgment of the general term against MacDonell, and the amount for which he was liable to his attorney, and interest to time of trial, all of which was properly proven ; and made out a complete cause of action for the plaintiff.

IV. The defendant's objection to the reception of the first order of the county judge, and the return thereto in evidence on the ground that it did not purport to be an order of any court, is not well taken for the reasons :

1st. That the defendant understood it to be an order from the county court, which is evidenced by his making an amended return thereto, and having made a return, he is liable for its falsity.

2d. And even if the objections were well taken, the evi

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dence was merely immaterial, the second order and return thereto covering precisely the same ground.

V. The motion for non-suit is equally unavailing.

It was most clearly proven that the defendant knew his return and amended return were false, and it is so found by the jury. In addition to the general requirement of the law that he make a correct return, his attention was particularly called to the matter complained of by two several orders from the county court.

It was not necessary on this trial for the plaintiff to show that the evidence excluded was true in fact, or that it would have made out a defense to the action. It was sufficient for the purposes of this action to show that the defendant knowingly refused to return material evidence that had been offered on the trial before him; and this he did. The motion for non-suit was properly denied.

VI. The three exceptions to the charge, and the eighth exception to the judge's refusals to charge, are not of sufficient importance to require any argument. Upon the positive and unequivocal testimony given by the plaintiff, showing beyond all dispute that the testimony was offered, objected to and excluded by the justice as is claimed, the charge is as favorable for the defendant as could be expected. That the evidence was offered before the justice, no witnesses even on the part of the defendant pretended to deny; they only endeavor to make it appear that the justice did not "rule on it." It is simply ridiculous to pretend that no ruling was made upon it. If there had not been any ruling on it, why the necessity of reducing it to writing, and if it was not ruled out, why was it not given when the witness was on the stand? But the justice does not pretend in his amended return, that it was not offered and excluded; he simply "don't recollect." And he says, "I can't swear whether he made any such offer as that read here to-day."

I am of the same opinion that the judge seems to have been at the trial, that there was really not enough proven by the defendant to amount to a conflict of testimony. A

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verdict for the defendant would have been set aside as being contrary to evidence.

The judgment should therefore be affirmed with costs.

MARVIN, J. This case is somewhat complicated, and not entirely free from difficulty.

I have no doubt a justice of the peace is liable for a false return to an appeal for any damages which a party to such appeal may sustain. In making the return, the justice acts ministerially.

The evidence in this case seems to have been fairly submitted to the jury, and the defendant cannot complain of the rule which the learned justice imposed upon the jury.

The jury, under the charge, must have found that the offer of evidence was substantially as claimed by the plaintiff; and that it was rejected; and also, that the defendant at the time he made his return or amended return, recollected the facts, or that by a proper effort to refresh his memory, he could have brought the facts to his recollection; and that he intentionally omitted or neglected to use such effort, with a design on his part, to prevent a reversal of the judgment.

This rule was sufficiently restricted and favorable to the defendant.

Assuming that the offered evidence, if received and given, would have constituted a defense, it was clearly error to reject it, if it was admissible under the pleadings; and, of course, such error would have caused a reversal of the judgment, and the defendant would have been relieved from the judgment of the justice, and the costs upon appeal, and would have recovered costs. It seems to me, therefore, that the measure of damages adopted by the court was correct, assuming that the action was maintainable.

This brings us to the important question of the case. The defendant's counsel claims that the ruling of the justice, rejecting the evidence, if actually made, was right under the pleadings; that such evidence was not receivable under a *denial* answer; that it was new matter, and should have been pleaded.

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If this position is correct, the judgment must be reversed, for the plaintiff has not been injured by the return.

I am not able to assent to this proposition. It is well settled law, that a plaintiff cannot recover damages in an action for the negligence of the defendant, if his own negligence contributed to the injury. The gravamen of his action is that he sustained damages, by reason of the negligence of the defendant, not by reason of the negligence of the defendant *and himself*. His complaint avers that the damage was by reason of the negligence of the defendant. This averment is put in issue by the denial answer, and if the facts put in evidence by the plaintiff do not show his negligence, I think the defendant may, if he can, prove such negligence, and thus negative the complaint. It is not new matter, admitting the cause of action and avoiding it, but it is matter showing that the plaintiff never had any cause of action.

As the plaintiff must be free from fault, some of the cases intimate that he must prove affirmatively that he was without fault, and that it must so appear from his evidence. I doubt this, for the reason that the law will not presume fault to any one, and although it must appear from the complaint that the injury resulted from the *negligence* of the defendant, the law will presume both parties free from negligence until the testimony overcomes the presumption. Hence the plaintiff must prove the negligence of the defendant, and as to his own negligence, if it is not made to appear by the testimony he gives (as it generally is), he may rely upon the presumption of his innocence, and leave the defendant to answer the presumption by evidence. All the evidence is pertinent to the question whether there ever was a cause of action.

The general rule in *Stoddard* agt. *Onondaga Annual Conference* (12 Barb. 576), referred to by counsel, "that new matter constituting a defense, under the Code, must be taken to mean, some fact, which the plaintiff is not bound to prove, in order to make out his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the

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complaint," is sound enough. Whatever, as evidence, the law presumes in one's favor, need not be otherwise proved, but it may, unless the presumption is conclusive, be disproved, or the presumption be rebutted by evidence. Pleading *new matter* as a defense, pre-supposes that a cause of action once existed, and the new matter is to defeat it. Now, in this case, if in truth the negligence of the plaintiff contributed to the injury, the plaintiff never had a cause of action.

I am satisfied that the evidence offered should have been received under the denial answer, and had it appeared by the return that it was offered and rejected, the judgment of the justice must have been reversed, and the defendant would have been relieved from it and the costs, and hence to such extent he sustained damage by reason of the false return. And this is an answer to the position of the defendant, that it was incumbent upon the plaintiff on this trial to prove the actual existence of the facts offered to be proved on the trial before the justice. If it was error to reject the offer, the appellate court cannot inquire whether the party making the offer could have given the evidence.

There were several requests to charge and refusals, or refusals with explanations and exceptions taken. I have examined them, and think that none of the exceptions were well taken. The court might well have held that the evidence as offered would have constituted a defense. But it was entirely correct to charge that if the evidence would have tended to establish a defense, it should have been received. And also, the proposition, that unless the evidence offered would have tended to establish a defense, there could be no recovery.

That part of the charge relating to the offer to prove that the plaintiff by his negligence, injured defendant's buggy, was not objectionable. The jury were told that such evidence would not be sufficient to enable the plaintiff to maintain his action, but if the jury were satisfied it was made, it would be a circumstance proper for consideration in determining whether the other offer was not made; in other words,

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consider all the circumstances in evidence, and say whether the offer, the rejection of which was error, was made.

Upon the whole, I think the judgment must be affirmed, and the order denying the motion for a new trial must be affirmed, with costs.

All the justices concurring, judgment affirmed.

SUPREME COURT.

AMOS WOODRUFF agt. PATRICK DICKIE.

The power of the court to allow *amendments to pleadings* has not been enlarged by the Code. The act concerning *amendments and jeofails*, passed in 1788, and incorporated into the Revised Laws of 1813, gave the same general power; and the Revised Statutes allowed amendments either in form or substance, for the furtherance of justice.

Neither at common law, nor under any of the previous statutes, did the courts ever claim the power, to allow an amendment to any existing pleading, by the insertion of a *new and different cause of action or defense*.

The clause of the Code which allows an amendment "by inserting other allegations material to the case," does not extend the power over amendments setting forth a *new cause of action or defense*.

An *amendment* is the correction of some error or mistake in a pleading already before the court, and there must therefore be something to amend by. Whereas, the insertion of facts constituting a *new cause of action or defense*, would be a *substituted pleading*, and not an amendment of an existing pleading. There are no cases which furnish a satisfactory reason for holding such an amendment to be within the power of the court to grant.

There is nothing in the Code increasing the power of amendment beyond that which had previously been exercised by the court, and the decisions prior to the Code should prevail.

Section 272 of the Code provides that *referees* "shall have the same power to grant adjournments and to allow amendments to any pleadings, and to the summons, as the court upon such trial, upon the same terms and with the like effect."

The words "as the court upon such trial" inserted in this section would seem to be unnecessary, inasmuch as the court has no other greater or less power "upon the trial," in respect to amendments than at special term, or in banc, or otherwise.

There is no distinction between the powers of the court while sitting in different branches. It is enough that the court may amend any pleading, and that the power is not limited to any branch or part of the tribunal. All the powers of the court may be exercised by a single judge while sitting as a court, except when the power is confined to the court as a collective body. All statutes conferring jurisdiction give it to the court, and not to the members composing the tribunal.

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There is no doubt that as regards the allowance of *amendments of pleadings*, a judge presiding at the trial of a cause with a jury possesses all the powers of the court, and can allow them in the same manner and with the like effect as the court sitting in any other organized form.

Referees are no longer officers of, or under the control of the court. They become by appointment an *independent tribunal* having such powers as are given by statute, and their decisions are reviewable only *on appeal* from their judgments.

Referees now possess all the powers of the court, and their allowance or disallowance of an amendment can only be reviewed, if reviewable at all, in the manner other decisions are reviewed *on appeal*.

Heard January General Term, 1866.

Before BARBOUR, MONELL and GARVIN, Justices.

APPEAL from an order denying a motion at special term for leave to amend the answer.

This action was brought to recover the last of several installments claimed to be due upon a contract for building a store, and also for extra work done thereon. The complaint set out the contract which provided, amongst other things, that alterations or additions might be made which were to be paid for; that the building should be finished by the first of November, and in default a deduction of sixty dollars a day might be made out of the last installment; that the work should be done according to the plans and specifications of the architect named, in a good, workmanlike and substantial manner, and of good, proper and sufficient materials, and that the last installment of the contract price should be paid on completion of the building.

The answer admitted the contract and that alterations were made, but paid for as done; denied performance of the contract on the part of the plaintiff, and that he was not entitled to recover the last installment.

The action was referred to a referee to hear and determine all the issues. While the trial was pending before the referee, the defendant moved the referee for leave to amend his answer.

The proposed amendments were allegations that the building was not erected in accordance with the contract and specifications, nor in a good, substantial and workmanlike manner. That the plaintiff used in the construction thereof, materials of an inferior quality, and in less quantities than

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required by the contract. That the plaintiff failed to finish the building by the first of November, whereby the defendant was entitled to deduct from the last installment the sum of sixty dollars a day for every day thereafter. That by reason of the failure of the plaintiff to complete said building by the time aforesaid, the defendant had sustained damages. That the plaintiff used in the construction of said building a large quantity of brick, belonging to the defendant, the value of which the defendant claimed to recover from the plaintiff. The defendant demanded an additional "judgment against the plaintiff for the damages sustained by him as aforesaid and for his counter-claim."

The referee denied the motion, whereupon the defendant moved before Mr. Justice MONELL, at special term, for leave to amend his answer in the manner before stated.

The justice denied the motion, and the defendant appealed.

J. TOWNSHEND, *for appellant, defendant.*

L. A. LOCKWOOD, *for respondent, plaintiff.*

By the Court, MONELL, J. When this case was before me at special term, I entertained the opinion, and so held, that by recent amendments of the Code, referees possess all the powers of the *court* in granting amendments of pleadings, and that the referee in this case, having denied the application made to him to amend the answer, his decision, if reviewable at all, could only be on appeal from the judgment.

A more careful examination of the subject, since the argument of this appeal, has confirmed my opinion.

The power of the *court* to allow amendments to pleadings has not been *enlarged* by the Code. The act concerning amendments and jeofails, passed in 1788, and incorporated into the Revised Laws of 1813 (1 *R. L.* 117), gave the same general power, and the Revised Statutes (2 *R. S.* 441, § 1), allowed amendments, either in form or *substance*, for the furtherance of justice.

The 173d section of the Code is not more comprehensive than either of the statutes referred to, and the only part of

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the section which it is *claimed* enlarges the power, is in allowing other allegations, "*material to the case*," to be inserted (*Beardsley* agt. *Stover*, 7 *How. Pr. R.* 294).

Neither at common law, nor under any of the previous statutes, did the courts ever claim the power to allow an amendment to an existing pleading, by the insertion of a new and different cause of action or defense. (*Sackett* agt. *Thompson*, 2 *J. R.* 206; *Heneshoff* agt. *Miller*, *Id.* 295; *Trinder* agt. *Durant*, 5 *Wend.* 72; *Williams* agt. *Cooper*, 1 *Hill* 637.) In *Trinder* agt. *Durant*, it is said, that the Revised Statutes, which in *broad terms* gives the power, were not intended to change the practice, which before was usual as to amendments.

Under the Code, however, in a few cases, it has been held that the court has power to allow as an amendment, the insertion of a new cause of action. (*Beardsley* agt. *Stover*, *sup.*; *T. & R. R. Co.* agt. *Tibbits*, 11 *How. Pr. R.* 168; *Union Bank* agt. *Mott*, 19 *Id.* 267.)

The clause of the Code which allows an amendment, "by inserting other allegations material to the case," does not, in my opinion, extend the power over amendments setting forth a new cause of action or defense. What is the "*case*? Is it not the facts stated in the pleading, as constituting the cause of action or defense? Clearly, it is; then the allegations proposed to be inserted must be material to the "*case*" already made, and not merely material to another and wholly different case.

An amendment is the correction of some error or mistake in a pleading already before the court, and there must, therefore, be something to amend by, whereas, the insertion of facts constituting a new cause of action or defense, would be a substituted pleading, and not an *amendment* of an existing pleading.

The cases referred to furnish no satisfactory reason for holding such an amendment to be within the power of the court to grant. In two of the cases (*T. & B. R. R. Co.* agt. *Tibbits*, and *Union Bank* agt. *Mott*), it is in effect merely assumed that the court has the power, and in the other case

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(*Beardsley* agt. *Stover*), a criticism is attempted on the section of the Code which it was thought would aid in interpreting the statute and cover the point decided. The amendment of the section in 1851, added the words to the last clause, "when the amendment does not change substantially the claim or defence," and it was said, that the amendment was restricted to the power to conform the pleadings to the facts proved. The limitation in the last clause, to amendments which do not change the claim or defense, does not either in terms, or by implication, enlarge the power as to other amendments, and as there is nothing in the section increasing the power, beyond that which had previously been exercised by the court, the decisions prior to the Code should prevail.

This is expressly recognized in *Corning* agt. *Corning* (6 *N. Y. R.*, 2 *Seld.* 97, 105); *Walters* agt. *Bennett* (16 *N. Y. R.* 250); *Whitcomb* agt. *Hungerford* (42 *Barb.* 177); *Davis* agt. *Mayor, &c. of N. Y.* (14 *N. Y. R.* 506). In the last case the power to amend is discussed, and it was held, that the court has not the power to add new parties.

It is provided by the statute that referees "shall have the same power to grant adjournments, and to allow amendments to any pleading * * * as the court *upon such trial*, upon the same terms, and with the like effect" (*Code* § 272)

A distinction has been attempted to be drawn between the powers of the court while sitting in different branches of the same tribunal; and it is said that a judge *at the trial*, has not the same power to grant amendments as is possessed by the court. (*Cases cited supra*; and *per* GRAY, *J. Everett* agt. *Vendryes*, 19 *N. Y. R.* 439.)

The Code makes no such distinction; nor can there be such a distinction under the present organization of the courts.

The 173d section gives the power of amendment to *the court*. It does not mean the court sitting in *banc*, nor *at* special term, but the court wherever it may be, and *while* exercising its functions *as a court*. Has it ever been doubted that a judge sitting *at nisi prius* may allow an amendment of a pleading? I think not. Yet the Code gives power to

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the *court* only, and not to the judge. Has a judge at special term, held for hearing motions, any greater power than a judge at special term for the *trial* of actions with a jury? Certainly not. All issues are triable at a special term, either with or without a jury, and in either case the same general functions are exercised. A court requires merely the presence of the judges, or a competent number of them, and a clerk; that constitutes the index, or in corporal being called a court.

And it is well settled, that unless the statute in conferring a power, makes a distinction between the powers of a judge and the court, no distinction can exist (*Smeeton* agt. *Collier*, 1 *Ex. R.* 459).

All the powers of *the court* may be exercised by a single judge while sitting as a court, except where the power is confined to the court as a collective body. A single judge may hold a circuit or special term. He can preserve order, punish contempts, hear and decide cases. He does this under the power given to the *court*, and not to him as a judge thereof; and all statutes conferring jurisdiction, give it to the court, and not to the members composing the tribunal.

In the cases referred to, the question is rather assumed than considered.

In *Woodruff* agt. *Hurson*, it was held that the amendment contemplated a new defense *pro tanto*, and was not allowable. And *Everett* agt. *Vendryes* was put on the same ground; and the remark of the judge, that the application to amend "at the trial," was properly denied, amounts to nothing.

In *N. Y. Marble Works* agt. *Smith* (4 *Duer*, 362), it was doubted if the court had the power to allow an amendment *at the trial*, letting in an entirely new defense. But the point was not decided, as the court held that the granting or refusing leave was discretionary, and not the subject of an exception. And in *Robbins* agt. *Richardson* (2 *Bosw.* 248), a similar doubt is suggested.

In none of these cases, or any of the cases I have found, with a single exception, is any reason furnished for the sup-

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posed distinction ; and the suggestion or doubt thrown out, was not necessary for the decision of the case.

It is enough that the *court* may amend any pleading, and that the power is not limited to any branch or part of the tribunal. Convenience may require the adoption of a practice designating the place where all applications to the court may be made. But the statute makes no such designation, nor does it make any distinction in the power, or the right to exercise the power of the court, between its different branches or parts.

In the case of *The Union Bank* agt. *Mott* (18 How. Pr. R. 506), the learned justice who decided that case at special term, was of the opinion that the 170th section of the Code, alone gave power to allow amendments *at the trial*. That section, in conjunction with the one immediately preceding it, has reference to *variances* between the pleadings and proofs, and authorizes the court to direct the facts to be found according to the evidence (in other words to disregard an immaterial variance), or to order an immediate amendment of the pleadings. Nothing is said in either section about this being done at the *trial*, and although questions of variance will naturally, and perhaps exclusively arise on the trial, there is nothing, that I can find, to prevent the court from allowing an amendment under that section at another time. Besides, the power to conform the pleadings to the facts proved under section 173, must usually be exercised at the trial.

In *Cayuga County Bank* agt. *Warden* (2 Seld. 19, 27), an amendment *at the trial* under section 149, now section 173 of the Code, was sustained. And in *Davis* agt. *The Mayor, &c. of N. Y.* (*supra*), the amendment was made at the trial under section 173, and was disallowed *only* because there was no power to add parties.

In view of all these sections, therefore, there is not, in my opinion, any doubt that as regards the allowance of amendments of pleadings, a judge presiding at the trial of a cause with a jury, possesses all the powers of the court, and can allow them in the same manner, and with the like effect as

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the court sitting in any other organized form. If I am correct in this, then the words used in the 272d section, giving to referees the same power "*as the court upon such trial*," would seem to be unnecessary, inasmuch as the court has no other greater or less power "upon the trial" in respect to amendments, than at special term, or in *banc*, or otherwise.

Referees are no longer officers of, or under the control of the court. They become by appointment, an independent tribunal having such powers as are given by statute, and their decisions are reviewable only on appeal from their judgments.

The legislature has from time to time, increased the powers, and added to the dignity of this tribunal; and it was the plain intention of the legislature, it seems to me, that it should possess all the powers, and exercise all the functions of a court, independently and without accountability to any other tribunal; and that its decisions should be subject to review, only on appeal.

In this view, notwithstanding the peculiarity of the language of the 272d section, I am of the opinion, that referees now possess all the powers of the court; and their allowance or disallowance of an amendment can only be reviewed, if reviewable at all, in the manner other decisions are reviewed on appeal.

I am in favor, therefore, of affirming the order, but without costs to either party, as the question is new.

The effect of this affirmance will leave the appellant at liberty to renew his motion to the referee, under this exposition of his power to allow the amendment.

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SUPREME COURT.

ALLEN S. CAMPBELL, appellant agt. **SAMUEL F. COWDREY**
executor, &c. of **MARY S. FISH**, deceased, respondent.

Where there is no provision in a will specifying the time when a legacy shall be paid, it is payable *one year from the time of granting letters testamentary or administration.*

But the legatee, in such case, has a right to the interest on, the legacy after *one year from the death of the testator or intestate.* The old rule in equity is still in force governing the payment of interest in such cases.

New York General Term, November, 1865.

Before INGRAHAM, P. J., BARNARD and LEONARD, Justices.

MARY S. FISH died 13th March, 1862, leaving a last will and testament, dated October 14, 1856, and a codicil, dated November, 1856. By her will, after devising and bequeathing to the appellant certain real estate, household furniture, &c., she devises and bequeaths to her executors, and the survivors of them, all the residue of her estate, real and personal, in trust, to sell her real estate as soon after her decease as conveniently may be, and to convert into money all her personal estate, and until sale of her real estate to collect the rents thereof, and out of the rents and the proceeds arising from the sale of her real estate, in the first place, to pay her debts and funeral expenses as soon after her decease as conveniently may be, and in the second place, to pay to the appellant \$15,000, which sum she devised and bequeathed to him, such payment to be made in bank stock at its market value, or in cash, if appellant so elected; then after giving \$1,000 to Charlotte Smith, a colored woman, she directs that the residue of her estate be divided into seven equal parts, and to be distributed among certain persons who were children and grandchildren of a deceased sister of the testatrix.

She appoints the respondent and others executors.

By the codicil to her will, she gives and devises to the appellant, in addition to the above sum of \$15,000, the further sum of \$5,000, making altogether the sum \$20,000, to

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be paid to him in cash before any payment should be made to any person or persons whatsoever.

The will and codicil were propounded for probate by the respondent, on the 26th March, 1862. The probate was opposed and contested by the residuary legatees and devisees. In consequence of such opposition, the will was not admitted to probate until the 29th February, 1864, when letters were issued to respondent, the sole surviving executor.

On the 31st May, 1865, the surrogate, on the application of appellant, issued a citation to the respondent, requiring him to account, or that he admit assets sufficient to pay the legacies to the appellant, with interest from 13th March, 1863, and if he admit sufficient assets, then that he show cause why said legacies and interest should not be paid.

The citation was served on respondent, and on the return day he filed a written admission of sufficient assets, and submitted to the surrogate whether interest on said legacies must be paid from the period commencing at the expiration of one year from March 13, 1862 (the day of the death of Mrs. Fish), or the period commencing at the expiration of one year from February 28th, 1864 (the day letters testamentary were issued.)

The surrogate decided that the appellant was entitled to interest on the legacies from the 1st March, 1865, being one year from the issuing of letters; and denied the application of the appellant for the payment of interest from the 13th March, 1863, being one year from the day of the death of the testatrix (*Opinion of Surrogate, fol. 61*).

An order having been entered in conformity with the decision of the surrogate, the appellant took an appeal to this court, and the respondent answered the petition of appeal.

J. S. LAWRENCE, *counsel for appellant.*

First. The surrogate erred in deciding that the appellant was not entitled to interest on the legacies of

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\$15,000, and \$5,000 from a period commencing one year from the decease of the testatrix.

1. Where no time is specified in a will for the payment of a legacy, the rule of law has always been that interest commences to run on the amount of the legacy at the expiration of one year from the death of the testator. (*Williams on Exrs.* 1284; *Dayton on Surrogates*, 465; *Willard on Exrs.* 355; *Lawrence agt. Embree*, 3 *Bradford*, 364; *Pearson agt. Pearson*, 1 *Schoales and L.* 10; *Gibson agt. Bott*, 7 *Vesey*, 96; *Wood agt. Penoyer*, 13 *Vesey*, 333.)

2. The statute (3 *R. S.* 177, § 48, 5th ed.), which provides that "no legacies shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid," has not changed the rule as to the payment of interest on legacies. (*Lawrence agt. Embree*, 3 *Bradford*, 364; *Dayton on Surrogates*, 465.)

3. The law of this state prior to the Revised Statutes (See 1 *Revised Laws* of 1813, page 314, § 18), provided that "when no time was limited by a will for the payment of a legacy, the executor should have the space of one year to discharge the same." So that before the statute, payment of a legacy could not be enforced until after the expiration of the year that the executor had to pay in, and it was not legally payable before that time, and yet the courts allowed legatees interest one year after the death of the testator (*Williamson agt. Williamson*, 6 *Paige*, 300).

4. The present statute is merely prohibitory to the executor or administrator against payment within one year, and makes the delay compulsory, whereas by the former law the executor might, at his option, pay within the period. The time when the legacy was legally payable, was the same before and since the statute, that is, one year after the executor receives his letters. The statute does not vary the rights of a legatee under the general rule of law that interest commences to run after the expiration of one year from the death of the testator. The legatee cannot enforce payment

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until one year after letters issued, but he can at that time, demand the legacy with all its accretions of interest.

The object of the statute was, as is well stated in *Lawrence agt. Embree* (3 *Bradford*, 474), to allow a specified time to the executor or administrator to settle the estate, and was not designed to modify or affect the rights of parties interested in claims or legacies.

5. The law prior to the Revised Statutes also required that in all cases where a legatee received the amount of his legacy, a bond should be delivered to the executor, conditioned for repayments in case debts should afterwards be established beyond the amount of assets in the executor's hands. The Revised Statutes so far changed the law as to require a bond only where the legacy was paid within the year, and the revisers, in their note to the section which prohibits an executor from paying until after the expiration of one year from the issuing of letters, state that they have omitted the provisions requiring a bond after a year, and instead of it, propose to make it the interest of creditors to present their claims early, and to look to the legatees and next of kin in case of any unnecessary delay in presenting claims.

6. The prohibition against payment within one year, unless specially authorized by the will, was therefore intended to prevent the executor from devoting the assets of the estate to the payment of legacies during the time within which creditors had a right to present their claims, and was also designed to prevent the delay which might be occasioned to creditors in case the executor was compelled to resort to an action on his indemnity bond to provide a fund for the payment of creditors, and in no way affects the right of the legatee to receive interest after the lapse of a year from the testator's death. It postpones payment of the legacy, but does not deprive the legatee of any interest which he might have claimed before the passage of the statute.

Second. The case of *Bradner agt. Faulkner* (2 *Kernan*, 472), which the surrogate in his opinion considers as conclusive against the appellant, is no authority upon the

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question before the court. The facts in that case were that a testator died in November, 1850, and letters upon his will were issued 31st December, 1850. By his will, he bequeathed to one of his daughters a legacy of \$16,000, and she in January, 1852, applied to the surrogate for an order that the legacy be paid to her, with interest from the time of the death of the testator.

The surrogate decreed payment of interest as applied for, and his decree was affirmed by the supreme court.

On appeal to the court of appeals that court rendered judgment of reversal.

The question before the court was simply whether the legatee was entitled to interest from the death of the testator, and the whole discussion in the opinion is upon the point as to whether there were any provisions in the will which indicated an intention on the part of the testator that the legacy should be payable sooner than at the time fixed by the statute, and the court having arrived at the conclusion that no such intention could be inferred, decided that the legatee was not entitled to interest from the death of the testator, and the judgment of the supreme court was therefore reversed.

7. Justice GARDINER, who delivers the opinion, prefaces it with the remarks that "as the statute prohibits the payment of legacies until one year from the time of granting letters testamentary, and, as the practice of the court prior to the statute allowed the same time to the executor, the decision of the courts below can only be justified by an express direction of the testator for earlier payment, or by some implication from the provisions, of the instrument which shall be equivalent to such direction," and he refers to the statute and to 6 *Vesey*, 539, 540, 548, and 6 *Paige*, 300, 305; but the remarks are only applicable to the question as to the time of payment, and not as to the time when interest commences. The cases cited by the learned judge as authority both establish the principle that interest commences to run upon a legacy one year after the death of the testator, and the chancellor in *Williamson agt. Williamson*, (6 *Paige* 300,

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says: "As no time was prescribed in the will for the payment of legacies, the executors were right in supposing that they came within the general rule, and that the legatees were not entitled to interest until the expiration of one year from the testator's death."

After his prefatory remarks the learned justice discusses the question as to whether there are any provisions in the will which indicate an intention that the legatee should have interest from the testator's death, and he arrives at the conclusion that there are not, and holds that "the burden is on the legatee to show a clear intent that interest should be paid from the time of the death of the testator; that the courts are not authorized to speculate as to intention or add to the will by mere conjecture."

The case being disposed of on the ground of an absence of intention on the part of the testator to give interest from the time of his death, the remarks of the judge, that "the appellants could rely on the general rule that no interest would accrue until it became the duty of the executors to pay the legacy," are mere dicta, and were not necessary to the decision of the case. The question was not when a legacy commences to draw interest, but whether the legacy in question drew interest from the death of the testator. The case therefore, is not of controlling force and authority as against the claim of the appellant here.

Third. But if it is necessary to resort to the provisions of the will to establish the right of the appellant to interest prior to the expiration of one year from the time of issuing letters, then it is submitted that the will and codicil taken together indicate the intention on the part of the testatrix that the legacies should be paid to Campbell prior to the time when by law it became the duty of the executors to pay.

1. The testatrix, by her will, directs that her real estate be sold as soon after her decease as conveniently may be, and her personal estate converted into money.

She then directs that her debts and funeral expenses be paid as soon after her decease as conveniently may be, and

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then gives the legacy of \$15,000 to the appellant. By the codicil she gives to the appellant "the further sum of \$5,000, making altogether the sum of \$20,000, to be paid to him in cash, before any payment should be made out of her estate to any person or persons whomsoever.

2. As the appellant was by the codicil preferred as to time of payment to all other persons, and as the testatrix had by her will directed that her debts and funeral expenses be paid as soon after her decease as conveniently might be, it is apparent that she intended that the appellant should receive his legacies almost immediately upon her decease.

Such, therefore, being the intention of the testatrix, it should be carried into effect by the court by giving the appellant the interest claimed.

Fourth. The question on this appeal would not have arisen had it not been that the residuary legatees delayed probate by a fruitless contestation of the will. Had there been no contest the expiration of the year from the death of the testatrix, and of the year from issuing letters, would have been at about the same time.

If the claim for interest is disallowed, then the residuary legatees, who have occasioned a delay of two years in issuing letters, are benefited at the expense of the appellant, by receiving the interest for two years on the \$20,000 bequeathed to him.

Such was never the intention of the testatrix, and the court will not so far defeat her intention as to reward the unsuccessful opponents of probate with some \$2,800 in addition to the residuary estate bequeathed to them.

If such a doctrine is established, then a precedent is furnished which will lead to the contesting of all wills by residuary legatees, and offer a premium for vexatious litigation.

Such a result would be a scandal to the law, and can never be sanctioned by the court.

Fifth. The portion of the decree appealed from, denying the petition of the appellant for interest from March 13th, 1863, should be reversed.

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WM. L. COWDREY, JAMES T. BRADY *and*
WM. C. TRAPHAGEN, *counsel for respondent.*

First. There is no direction in the will or codicil when the legacies shall be paid, except that "Campbell is to be paid as soon as any other person."

Second. The statute does not give the executor authority to pay a legacy without the expressed direction of the testator, before one year from the time of granting letters, but expressly provides that "no legacies shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or administration, unless the same are directed by the will to be sooner paid" (2 Vol. 4th ed. R. S. p. 275, sec. 48).

Third. The general rule as to legacies is "that no interest would accrue until it became, by law, the duty of the executor to pay the legacy."

Fourth. A legacy is not legally payable until after the expiration of a year from the granting of letters testamentary, unless the will directs them to be sooner paid, nor do they draw interest before they become legally payable (*Bradner agt. Faulkner*, 12 N. Y. page 472).

Fifth. The order of the surrogate should be affirmed.

By the court, BARNARD, J. In the absence of an intent, either express or fairly, to be inferred from the provisions of the will, it is provided by statute that no legacy shall be paid until after the expiration of one year from the time of granting letters testamentary (3 R. S. 177, § 48, 5th ed). The testatrix by her will and the codicil thereto, has given no evidence of any intention to provide for the payment of the legacy in question before the time the law makes it payable. She has not said in words that such was her wish or direction. She has provided first for the payment of her debts, which cannot be legally ascertained until the expiration of one year from the issuing of letters. The claim of the appellant for interest upon his legacy from the death of the testatrix must fail. The negative evidence, from the

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silence of the will, and the fair inference from the terms of the will itself, show an absence of the clear intent which must be shown before this interest could legally be claimed. The legacy is not then payable until the expiration of the year from the issuing of letters; but it is claimed that at all events there should be allowed interest on the legacy from the expiration of one year from the death of testatrix. Where the will is silent as to interest upon a legacy, none will accrue until it becomes by law the duty of the executor to pay the legacy (*Bradner agt. Faulkner*, 12 N. Y. Rep. 472).

The decree of the surrogate must therefore be affirmed, with costs.

INGRAHAM, P. J. I concur in holding that the legatee was not entitled to interest until one year after the death of the testatrix.

I see nothing in the statute, nor in 12 N. Y. Rep. 472, to the contrary. In *Williamson agt. Williamson* (6 Paige Rep. p. 298), the chancellor states the rule to be that the legatees are not entitled to interest until one year after the death of the testatrix.

In *Bradner agt. Faulkner* (12 N. Y. Rep. 472), the question was whether interest was chargeable on the legacy from the death of the testator. In the opinion, GARDNER, J. says, "we cannot say but that the testator thought \$16,000 at the end of a year, without interest, equal to the same value in land," which would pass at once. Again, the testator "knew that a year was the reasonable time fixed by law for the payment of the legacy' unless he otherwise directed."

It is evident the attention of the court was not directed to the case of a residuary legatee contesting a will for years where the legacies were large, and where, if the views in the court below are sustained, the residuary estate is increased by the litigation.

I concur with Bradford, surrogate, in *Lawrence agt. Embree* (3 Bradford, 364), that the object of the statute was only to allow a specified time for the executor to settle the estate, and it was not designed to affect or modify the rights of

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parties interested in claims or legacies, and that the old rule in equity, governing the payment of interest, whereby a legatee is entitled to interest after one year from death of the testator, is still in force.

The plaintiff is entitled to interest after one year from the death of the testator.

Concur, WM. H. LEONARD.

COURT OF APPEALS.

JOHN BESIEGEL, appellant agt. THE NEW YORK CENTRAL RAILROAD COMPANY, respondent.

The want of caution which constitutes *negligence* in crossing a railroad, must in any given case, depend upon the circumstances under which the party is placed at the time.

The object of requiring an engineer upon a railroad engine to *sound an alarm* before reaching the crossing, is to put the way traveller on his guard; and when the engineer neglects the necessary signals, he deprives the traveller of one of the means upon which he has a right to rely for protection against the danger of a collision.

When a man on foot reaches a point near the crossing of a railroad in a populous part of a city, and listens and hears no signals or warning, he is not guilty of negligence for attempting to cross over the track, where he *cannot see up and down the track by reason of obstructions*.

But the railroad company ought not to be held liable for a collision in such a case, when they run their locomotives with moderate speed, and make the usual signals before reaching the crossings.

Where the plaintiff undertook to cross a railroad in a populous part of a city, over five tracks running east and west in a straight direction, just after a train of cars had passed from the west, in which direction there was nothing to obstruct his vision, but eastwardly his vision was obstructed, except about ten feet, by freight cars which stood near him on the two first tracks, and hearing no bell or whistle, he stepped upon the third track without looking east at all, but continued to look to the west, and before crossing, was hit and injured by a locomotive backing down from the east at a rapid rate :

Held, that the question of the plaintiff's negligence was one for the jury, and that a *non-suit* in the case was improperly granted.

It seems, that way travelers in crossing railroads, especially in cities, where obstructions to sight are frequent, have a right to depend upon their *hearing* as well their vision for protection in crossing.*

* If the plaintiff in this case had practiced upon this theory, it would seem that he ought to have avoided injury ; for it is very difficult to understand that the locomotive running at a rapid rate should not have made sufficient noise to have been heard by him a distance of some forty or fifty feet.

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March Term, 1866.

APPEAL from judgment of general term, affirming order of non-suit at circuit.

The plaintiff sued the railroad company for damages, for negligently running a steam engine against him, while crossing a track on St. Joseph street, in city of Rochester.

The evidence shows that the plaintiff was passing on the east side of South St. Joseph street, from north to south, when he saw a long train coming up from the west, and he waited until it had passed. He stood on the second track on the sidewalk. There are five tracks, and the two north tracks were filled with empty cars, ten or twelve in number on each track, on the east side, and near to the sidewalk. When the long train had passed, making a good deal of noise, the plaintiff started on, looking to the east as far as he could see, and the track was clear as far as he could see. He then turned his head to the west as he started to go across the tracks, and while crossing, an engine coming from the east, struck him on the shoulder and caused the injury. He did not hear the bell ring, except in the long train, and no flagman was there at the time.

The plaintiff had crossed the track often before this. He was standing on the second track when the long train passed, and remained there a minute and a half or two minutes. The empty cars which were standing on the first and second tracks, were so near him, that he could touch them with his hand. The first step he took, he looked east, but did not look eastward again, after he got over the south rail of the second track. He was looking west all the while after that, until he was struck by an engine backing down from the east. He could see down the third track about eight or ten feet, when he looked east, which was before he stepped over the south rail of the second track. It was conceded that the tracks are straight at this point. The empty cars that stood near the crossing were box freight cars, eight feet high.

The engine that struck him was running very fast leaving the Rochester depot; and the evidence tended to prove that the bell on the engine was not rung until after the accident.

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The engine that struck the plaintiff, was on the third track, and the engine tender projected over the track eighteen inches. The freight cars projected over the same distance. It also appeared that St. Joseph street is in a populous and thickly settled part of the city. By the map, it appears that the five tracks at this point, cross St. Joseph street at an obtuse angle, so that a person crossing from the north to the south side of St. Joseph street, could not see an engine approaching on the third track from the east, standing where the plaintiff did on the second track, with freight cars on the first and second track to intercept his view.

The court non-suited the plaintiff, upon the ground that it was his duty to have looked and ascertained before attempting to cross the railroad ; that he could safely pass the same, and that it was negligence in him not to do so.

GEORGE F. DANFORTH, *for appellant.*

T. R. STRONG, *for defendant.*

MORGAN, J. Upon the undisputed facts of the case, the plaintiff could have avoided the accident by exercising a little more precaution before he stepped on to the third track. If the freight cars had not intercepted his vision, he must have seen the engine approaching from the east, in time to have avoided the collision.

It is said that common prudence required him to put himself in a position to see whether there was a train coming from the east on the third track, before he attempted to cross it. The evidence, however, tended to show that the railroad company was guilty of great negligence in backing down at so rapid a rate of speed across South St. Joseph street, without any flagman to warn foot passengers of their danger, or without sounding an alarm from the engine. With their cars standing upon the track so near the crossing, the company was guilty of inexcusable negligence in omitting to take the usual and necessary precautions to prevent accidents.

As an original proposition, it seems to me, that the omis-

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sion of a railroad company to sound an alarm when approaching a crossing, especially when the view is obstructed by intermediate objects, is some excuse for the inattention of a way traveler to the danger of an approaching train. The way traveler depends upon his ears as well as his eyes, and when his vision is obstructed, and he is within a few feet of the track, and hears no alarm, it ought not to be thought very hazardous to step across the track. If he hears no signal, he does not expect a train to cross his path when he has but a few feet to go to cross over, and if he for greater precaution, stops and looks both ways before he makes the last step to reach the track, he exercises more precaution than a majority of our citizens do in similar circumstances.

The doctrine which requires travelers, in all cases to stop and look both ways, when approaching a railroad track, presupposes that railroad companies are guilty of violating their duties to such extent as to make it a matter of course, to expect a train to run over the streets of a city under full headway at any time, without signals or safeguards.

When the vision is obstructed, as in the case at bar, the way traveler generally listens to hear the alarm, and if none is given, it is not, or at least ought not to be, presumptuous in him to suppose that he can walk over the track with safety. He has a right to believe that the engineer will not run his engine with such dangerous speed, without ringing the bell, or sounding the whistle.

It is not sufficient to defeat this action, to say that in another case the plaintiff was non-suited, because he failed to look both ways before attempting to cross the track of a railroad. The want of caution which constitutes negligence must in any given case, depend upon the circumstances under which the plaintiff is placed at the time.

If the tracks had been clear, so that the plaintiff could have seen the approaching engine, then doubtless it would be negligence in him not to have seen it. So much must be conceded as settled by the adjudications in this state.

It is said the plaintiff ought to have known from the number of tracks that such a thing was likely to happen as did

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happen in this instance, and as it happens probably very often. But this supposes that the railroad company very often backs down an engine upon their tracks across St. Joseph street, in a crowded part of the city at a rapid rate of speed, without a flagman at the crossing, and without giving any signal whatever of its approach. For if the usual signals are given, which the most ordinary prudence requires in such a case, it is not to be expected that such a thing will very often happen as did happen in this case. It involves a gross violation of duty on the part of the railroad company, and for that reason such a thing ought not to be expected by the way traveler. The very object of requiring the engineer to sound an alarm before reaching the crossing, is to put the way traveler on his guard; and when the engineer neglects the necessary signals, he deprives the traveler of one of the means upon which he has a right to rely for protection against the danger of a collision.

The evidence tended to show that the plaintiff was within a few feet of the third track, and heard nothing to give him warning of an approaching engine. He left his position, and stepped forward to cross it. He could not see the approaching engine, until he had got to the very point of danger, and then on account of the rapid motion of the engine, he was unable either to cross over, or to recede and avoid it.

The court below maintains the proposition that the plaintiff, although he had waited on the second track until the train had passed, and had heard no signal of another, yet that he should have stopped again and looked down the third track before attempting to cross it. And this is put upon the ground that it might be expected that an engine at full speed would be rushing along at that very time without giving any warning of its approach.

I cannot subscribe to such a proposition. It was I think, a question for the jury to decide, whether, under the particular circumstances of the case, the plaintiff was wanting in ordinary prudence in attempting to cross the third track

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when he did, without taking other precautions to discover that it was clear.

Doubtless, if the engineer gives the usual signals, and the way traveler does not hear them, it would be his misfortune if he came in collision with the engine. So if the way traveler cannot see the train with his eyes in time to avoid it, it is his folly if he ventures to proceed, and comes in collision with it. But when he cannot have the use of his eyes to discover the danger, until he reaches the track upon which the train is approaching, and upon stopping a few feet short to listen, he hears no signal, can it be said as an abstract proposition, that the plaintiff is guilty of negligence, because he trusts his ears, and comes to the conclusion that it is safe to take the few steps necessary to pass over it? If he has listened while standing within a convenient distance of the track, and has heard no signal of an approaching train, if he has but a few steps to go to cross it, and if acting on this belief, that it was safe (as nine men out of ten would do in a similar situation), he started on, and was met by an engine running along almost noiselessly and at great speed, can it be said with propriety, that he should have expected such a thing to occur as did occur in this case?

It is not necessary to decide that the plaintiff was not guilty of negligence. All I claim is, that considering the peculiar position this plaintiff was placed in, as may be gathered from his own statement; his proximity to the track; the few moments it would take to clear it; his obstructed vision, and the noise and confusion at the time; that no signals were sounded from the approaching engine to put him on his guard, and the unusual speed with which the engine approached him; I say, considering all these circumstances, it should have been left to the jury as a question of fact to determine whether or not the plaintiff was guilty of negligence in attempting to cross the tracks, without taking further and additional precautions against the danger of a collision.

If, however, the evidence should disclose that the plaintiff was heedless or careless, and neglected to avail himself of

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the usual precautions, which men of common prudence would use in like circumstances, he cannot recover, under the well settled rule that his own neglect contributed to procure the injury.

The degree of care which a way traveler should observe, when about to cross a railroad track, has been discussed in several adjudicated cases. In *Pennsylvania R. R. agt. Ogier* (35 *Penn. R.* 160), it was held that negligence was a relative term when applied to a traveler in such a case, and consisted in the absence of that ordinary care which a party ought to observe under the peculiar circumstances in which he is placed; and that a different degree of care is required, when there is reason to apprehend danger, from that which is necessary when none is to be expected.

It was further held that a defendant cannot impute a want of vigilance to one injured by his act or negligence, *if that very want of vigilance was the consequence of an omission of duty on the part of the defendant.* In *Johnson agt. Hudson R. R. Co.* (20 *N. Y.* 66), the same views were expressed, and it was held that the deceased was bound to exercise *ordinary* prudence and no more; and it was for the jury to determine whether it appeared from the evidence that there had been, on the part of the deceased, a want of that care and foresight that men of ordinary prudence are accustomed to employ, 'placed in like circumstances' (p. 68). And in *Warren agt. Fitchburg R. R. Co.* (8 *Allen* 227), it was held that crossing a railroad track without looking to see if a train is coming, is not conclusive proof of want of care, although with nothing to explain or qualify the act, it would be regarded as negligence. The plaintiff in that case followed the direction of the station agent to cross over. The path by which he went to the train was somewhat oblique, in that the engine which struck him came in a direction partially behind him. The court say: "Whether in this condition of things, his anxiety seasonably to reach the train, which would stop but a moment, the plaintiff at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross

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over, given without any condition or qualification; whether he might naturally, and without subjecting himself to the imputation of want of care, have considered himself under the charge of the defendants' agent, with an assurance that it was safe and proper to go directly to the cars, were questions for the jury and not for the court." The case shows that when he reached the outside of the platform he could see an approaching train at a distance of thirty or forty rods, but that he stepped off without looking that way, and did not hear the whistle until it was too late to escape collision. Unless I am not entirely mistaken, there were more circumstances of excuse for the plaintiff in the case at bar, than in the case of Warren.

The duty of a railroad company to exercise more caution and a higher degree of care when running their cars through a village or city, then in the country, as was held in *Fargo* agt. *The Buffalo and State Line R. R. Co.* (22 N. Y. 207), concedes that the company would be liable in not exercising it, when by so doing ordinary prudence on the part of the way traveler, would save him from a collision.

The good sense of the rule may be thus expressed: *Ordinary* care requires the way traveler to look for a train when approaching a railroad track. If he cannot see by reason of obstructions, it requires him to stop just short of the track and listen. If he does more than this, it is extraordinary caution, and what is not required on the part of the plaintiff to entitle him to recover against a railroad company, which has culpably omitted to sound an alarm before reaching the crossing, if the jury believe that the accident would not have occurred provided the *usual* signals had been given.

I distinguish the case at bar from those in this state, where it has been held that the plaintiff could not recover in consequence of his own want of caution in attempting to cross a railroad track. In *Dascomb* agt. *The State L. and B. R. R. Co.* (27 Barb. 221), the plaintiff drove along upon the track without taking the slightest precaution to ascertain whether or not a locomotive was approaching.

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In *Mackey* agt. *N. Y. C. R. R. Co.* (*Id.* 528), the deceased after being notified of the approaching train, whipped up his horses and undertook to cross the track, when he was struck by the locomotive and killed. In *Sheffield* agt. *Rochester and Syracuse R. R. Co.* (21 *Barb.* 339), the plaintiff was in plain sight of the track with nothing to obstruct his view. So in *Steves* agt. *The Oswego and Syracuse R. R. Co.* (18 *N. Y.* 422). In *Wilds* agt. *The Hudson River R. R. Co.* (24 *N. Y.* 435), it is assumed, in the opinion of the court, that the company complied with the requisitions of the statute by ringing, so that it was heard at a distance sufficient and in time sufficient to give abundant notice to all persons to keep off the track. A flagman was also at the station giving signals of the approaching train. This was, perhaps, sufficient to dispose of the case without reference to the misconduct or negligence of the deceased; but the opinion proceeds to state that the deceased himself, after notice of the danger, whipped up his horses and attempted to cross the track. Under this state of facts, the court very properly decided that the defendants were not liable. The action was tried again and judgment of non-suit ordered against the plaintiff. Upon appeal to this court, the judgment of non-suit was affirmed (29 *N. Y.* 315). The opinion was delivered by DENIO, Ch. J., in which he indulges in some observations, which I think are liable to be misunderstood when applied to the case at bar. "If" (he says) "the case is such as to require the person wishing to cross to come near the track to make his observations, this circumstance, so far from excusing him from the duty of looking at all, would only render this duty more imperative, if he would avoid the imputation of negligence." I agree that it is the duty of a person who is about to cross a railroad track, to make an observation before crossing, but in our cities the vision is completely obstructed by intervening obstacles, when it is often very difficult to see up and down the railroad track beyond the space of one or two buildings. However much we may speculate upon what should be considered prudence in such a case, our citizens walk over the

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track daily, depending upon their hearing more than they depend upon their eyesight, to determine upon the propriety of crossing over it. If locomotives were run as they should be, and as I think they generally are in our cities, with moderate speed, it would be rarely, if ever, that a foot passenger would be caught by an engine while he was crossing over the track in such a case. But if an engine is running in such a case at full speed, without making any signals of danger, then doubtless there is no safety except for the foot traveler to stop at every point to obtain an observation, until it is obtained, and then to run for his life until he is on the opposite side. If he can see both ways but twenty rods and has but four rods to go to get over the track, it might be prudent perhaps, for him to wait until he could see farther; for, if trains are allowed to run at full speed in our cities, an engine at twenty rods distant might overtake him before he had time to clear the last rail on the opposite side. Indeed it may be said with truth, that in our cities it is safer in many cases to listen for signals, than to attempt to see an approaching train, by looking up and down the track.

It is not unusual for empty cars and freight cars to stand upon the tracks near the crossings in our cities, some have engines attached to them, and are waiting some signal to start, some have no engines attached. In the meantime passenger trains are running in and out, and a person who wishes to cross the track is necessarily in some doubt as to the exact condition of things. His observation of the tracks is necessarily very limited, and the view he obtains quite unsatisfactory. There is often a curve in the track at a short distance from the crossing, so that he cannot see an approaching train without going quite a distance out of his way. In this condition of things ought we to establish the rule, that a foot traveler is guilty of want of ordinary care and caution by attempting to cross without first obtaining an observation of the track at a distance sufficient to insure his safety against a locomotive advancing towards him at the rate of thirty or forty miles an hour?

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In my opinion, we ought to hold the railroad company responsible in such a case, if they run at too great a rate of speed to allow a man to clear the track who has approached it, without being warned of the danger by the usual signals. When a man on foot reaches a point near the crossing, and listens and hears no signal or warning, I think he is not guilty of negligence for attempting to cross over the track in a case where he cannot see up and down the track by reason of obstructions. But I would not make the railroad company liable for a collision in such a case, when they run their locomotives with moderate speed and make the usual signals before reaching the crossing.

We are to look at the case at bar as it appeared from the plaintiff's statement, and we must assume that the defendants run their engine at a dangerous rate of speed, without giving any signals of danger; that the plaintiff listened when standing upon the second track and heard no alarm; that he could not see the engine until he was about to step upon the third track, when it struck him before he could get out of the way. In this view of the facts, I think the court below erred in holding as a matter of law, that the plaintiff was guilty of negligence.

The judgment should be reversed and a new trial granted, costs to abide the event.

PORTER, J. The non-suit seems to have been granted on the theory, that a citizen who crosses a railway track, at its intersection with a public highway, is an absolute insurer of his own safety against the criminal negligence of a wrong doer. It was sustained at the general term on the equally untenable theory, that the plaintiff, who looked in each direction before crossing, and saw no engine approaching, was guilty of culpable negligence in not continuing to look both ways simultaneously. In either aspect, the decision was plainly erroneous.

The plaintiff owed no duty to the defendant beyond the exercise of ordinary care. The proof is clear, not only that he was free from negligence, but that he exercised more cir-

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cumspection and care than most men would under similar circumstances.

He was on the east side of St. Joseph street, proceeding in a southerly direction, and on arriving at the crossing, he observed the approach of a train of cars from the west, on the fifth or southern track. He stopped at a safe distance and waited until the entire train had passed. He stood at the point where the second track crossed the sidewalk. This, and the first or northern track, through some unexplained neglect of the company, were used as a place of deposit for empty freight cars, eight feet in height, extending up to within three feet of the sidewalk, and thus obstructing in a considerable degree the eastern view of the tracks used by the trains. No other cars were in view, and there was no signal from any quarter of approaching danger. The flagman, whose duty it was to be at his post and display his flag when an engine was drawing near, or when, from any cause, the crossing was unsafe, did not appear to give the customary warning. It turned out, however, that at the moment the plaintiff resumed his way, an engine, unincumbered with cars was running rapidly backward from the east on the track next to that on which he had been standing. Its approach was so sudden and noiseless, that although four of the witnesses stood on the south side of the crossing, looking toward the north, and with nothing to obstruct their view, neither of them saw it until an instant before the accident.

The plaintiff knew nothing of this, and his first step brought him within some four feet of the point where he was struck by the projecting fender of the engine, which, though veiled from view, must then have been within forty feet of him. At the first step, he looked east, at the second west, and he was prostrated at the third. The whole affair was so instantaneous that he did not get to the track, but was knocked down before he reached it. After he started, less than two seconds intervened before his leg was crushed. All the witnesses swear that the engine was moving at a

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rapid rate of speed. All agree that the bell was not rung until after the accident.

Upon this state of facts, it is obvious that the gross negligence of the defendant's agents was the sole cause of the injury. The omission of the customary signals was an assurance by the company to the plaintiff, that no engine was approaching within a quarter of a mile, on either side of the crossing. On this he was entitled to rely, and to the defendant he owed no duty of further inquiry. He was not bound to be on the lookout for danger, when assured by the company that the crossing was safe. The views expressed in the case of *Ernst* agt. *The Hudson River Railroad Company*, decided at the present term, are equally controlling in this case.

The judgment should be reversed, and a new trial ordered.

All the judges concurred, except DAVIES, Ch. J., who expressed no opinion.

Judgment accordingly.

SUPREME COURT.

STEPHEN VAN RENSSELAER agt. MARTIN TUBBS.

To compel the attendance and examination of a *party* under section 391 of the Code, a summons must be served upon the party to be examined; and the *notice* in writing prescribed by that section, must be served *upon the attorney of such party*, before the party can be brought into contempt. It is not necessary that such *notice* should be served upon the *party personally*.

Albany General Term, December, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

THIS is an appeal from an order of the special term, refusing to strike out the answer in the above action, for failure of the defendant to appear and be examined on behalf of the plaintiff, under section 391 of the Code. Notice in writing of such examination was served upon *the attorney of the defendant* five days previous to the day fixed for such

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examination ; and a summons was served upon the defendant three days previous thereto, requiring his attendance as aforesaid. The defendant did not appear, *because the five day's notice was not served upon him personally.* The plaintiff moved at special term to strike out the answer, which was denied, and the plaintiff appeals.

P. F. COOPER, *for plaintiff.*

ANSON BINGHAM, *for defendant.*

By the Court, INGALLS, J. The question presented upon this appeal, is whether the notice of examination prescribed by section 391 of the Code should have been served upon the defendant personally, instead of his attorney. Section 417 provides as follows: "Where a party shall have an attorney in the action, the service of the papers shall be upon the attorney, instead of the party."

Section 408 prescribes the manner such service shall be made. Section 418 is as follows: "The provisions of this chapter shall not apply to the service of a summons or other process, or any paper to *bring a party into contempt.*" The chapter referred to embraces sections 408, 417, 418. But for section 418, it would seem quite clear that the service of the notice upon the attorney was sufficient. If, therefore, the effect of such notice was to bring the defendant into contempt for failure to appear, it follows that the service upon the attorney was irregular and insufficient. I do not think section 391 should be so construed. It will be observed that the section provides for the service of such notice upon the party to be examined, *and any other adverse party*, and further provides: "But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance." Then follows section 392, which provides: "The party to be examined, as in the last section provided, may be compelled to attend *in the same manner* as a witness who is to be examined conditionally." The Revised Statutes (*vol. 3, page 673, 5th ed.*) proscribes the mode of taking the

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examination of a witness conditionally. Section 10 (*p.* 675) requires the service of a summons upon the witness to be examined. Sections 58, 59, 60 (*p.* 648) prescribes the manner obedience to such summons is to be enforced. The Code (§ 394) is as follows: "If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out." Section 390 provides *that a party to an action may be examined at the instance of the adverse party at the trial or conditionally, or upon commission, and may be compelled in the same manner as any other witness.*

I therefore, conclude that to compel the attendance and examination of a party under section 391 of the Code, a summons must be served upon the party to be examined; and the notice in writing prescribed by that section, must be served *upon the attorney of such party* before the party can be brought into contempt. This view is strengthened by the further consideration, that notice of such examination is to be *served upon every adverse party.* Certainly not for the purpose of bringing into contempt any party, other than the one whose examination is sought. The object of the notice is obviously to apprise all the adverse parties that such examination is to occur, and to afford them an opportunity to prepare therefor. And the summons is the process which is designed to compel the attendance of the party to be examined. This construction renders the whole proceeding harmonious. The cases *Gaughe agt. Laroche* (14 *How.* 451); and *Bleecker agt. Carroll* (2 *Abb.* 82), favor this construction. I am aware that the decision in *Leeds agt. Brown* (5 *Abb.* 418), is in conflict with the view above taken, but that decision is not in harmony with *Bleecker agt. Carroll* above cited, although decided by the same learned justice. I therefore conclude that the order of the special term in this case was erroneous, and must be reversed with \$10 costs. But as the practice under section 391 was not settled, I think the answer should not be stricken out absolutely, as the consequences may be too serious. An order should be entered reversing the order of the special term with \$10 costs;

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and that the answer be stricken out, unless the defendant attend and submit to an examination before the same referee, and at the same place named in the original notice and summons, upon a notice of five days to be served upon the defendant's attorneys.

SUPREME COURT.

WILLIAM A. HADDEN, JOHN A. HADDEN and FRANCIS POTT,
composing the firm of **HADDEN & COMPANY,** respondents,
agt. **JEREMIAH W. DIMICK,** appellant.

An agreement in writing was entered into between the parties in this action as follows: "It is hereby agreed between J. W. Dimick and Hadden & Co., that the said J. W. Dimick shall, for the three years next ensuing, unless this agreement shall be dissolved by Hadden & Co., on three months' notice, consign exclusively to the said Hadden & Co. all the blankets of his manufacture to be sold by them, and that the commission to be allowed Hadden & Co. for such sales shall be *seven and one-half per cent*, to cover the guaranty of debt and all charges (including insurance from fire) to which the goods may be subject, after being received in store.

New York June 12, 1861.

(Signed)

J. W. DIMICK. [SEAL.]

(Signed)

HADDEN & Co. [SEAL.]

Sealed and delivered in the }
presence of

(Signed) Wm. G. THOMSON,

Witness.

Held, 1st. That this agreement having been duly acknowledged by one of the plaintiffs' firm and by the defendant to have been properly signed, and being attested by a subscribing witness at their request, was properly admissible in evidence.

Held, 2d. That the partners authority to execute the sealed instrument was ratified by the subsequent acts of the plaintiffs under it, even if there was a failure of proof of authority existing at the execution of the paper.

Held, 3d. That the agreement was *mutual*; and that it was not in *restraint of trade*.

Held, 4th. That the agreement did not permit the defendant to sell blankets of his manufacture, himself, without a *breach* of the agreement.

Held, 5th. That all preceding and contemporaneous agreements were merged into the writing; and it was therefore right to reject the evidence offered as to a previous parol agreement in addition to the writing itself.

Held, 6th. That if the plaintiffs subsequently promised to be the defendant's *sureties* upon a contract to be obtained of the U. S. Government by the defendant, to sell his blankets to the Government, it was no defense to this action to recover the plaintiffs' *commissions* on the sales actually made by the defendant himself subsequently to the Government, by an agreement entered into by the

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defendant with the Government with other sureties than the plaintiffs. They had a right to recede if they had promised. (INGRAHAM, P. J. dissenting—holding that the plaintiffs' consent to defendant's selling to the Government might be inferred, or at least there was evidence enough to submit to the jury the question of their consent.)

New York General Term November, 1866.

Before INGRAHAM, P. J., BARNARD and LEONARD, Justices.

THIS case involves very important questions of an almost every day commercial character, and which, under the agreement of the parties, consist largely of facts which are brought out by the evidence and the points of the respective counsel. The dissenting opinion of Judge INGRAHAM seems to touch the only doubtful point in the case. The plaintiffs' statement is as follows: On the 12th day of June, 1861, the parties entered into the written agreement, of which the following is a copy:

"AGREEMENT.—It is hereby agreed, between J. W. Dimick and Hadden & Co., that the said J. W. Dimick shall for the three years next ensuing, unless this agreement shall be dissolved by Hadden & Co. on three months' notice, consign exclusively to the said Hadden & Co., all the blankets of his manufacture to be sold by them, and that the commission to be allowed Hadden and Co, for such sales, shall be *seven and one-half per cent*, to cover the guaranty of debts and all charges (including insurance from fire) to which the goods may be subject after being received in store.

New York, June 12, 1861.

(Signed)

J. W. DIMICK. [SEAL.]

(Signed)

HADDEN & Co. [SEAL.]

Sealed and delivered in {
the presence of }

(Signed) WM. G. THOMSON,

Witness."

It is in the handwriting of a clerk of the plaintiffs, and the signatures were acknowledged by the parties in the presence of the subscribing witness.

The words "including insurance from fire," were interlined by the defendant before the execution of the instrument, over some pencil memorandum. At the foot of the contract

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there was a pencil memorandum, a part only of which was legible at the time of the trial. It looked as though there had been four lines; the first two were mostly rubbed out, and were not intelligible; the other two were considerably rubbed out also (but not with india-rubber). The witness Prichard copied it, and his copy is to this effect: "that the goods should be advanced upon by the paper of Hadden & Co. to the extent of one-half of the invoice value." Dimick could not tell what the pencil marks were. Whatever they were, they were not incorporated in the written contract. There is no evidence when they were put there, or that they were on the paper when its execution was acknowledged, and the attention of the subscribing witness was not called to it, if it was there at that time.

Dimick, after the contract was made, applied at different times to Hadden & Co. for advances, to assist him in making new machinery for blankets. They always advanced to him when requested, until February, 1862, when they declined because the blankets would not sell.

For a statement of amount of advances, with the explanation by each party, see folios 118 to 123 and folio 149 of the case.

These advances were all made to enable Dimick to carry out his contract for blankets, by the procuring of machinery for their manufacture. They were purely voluntary on the part of Hadden & Co.

In the absence of an agreement, it is a matter of discretion with consignees whether to make advances or not.

After the execution of the contract, Dimick began to manufacture blankets, and in August, September, October, November and December, 1861, sent them to Hadden & Co. for sale.

In December there was an accumulation of blankets in their hands to the amount of \$10,000 to \$15,000, which they had not sold and could not sell at any price. Up to December they had sold only a few bales. The whole of these blankets were finally sold, in August, 1862, to the United States, and there was no period prior to this at which the

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blankets would have brought the prices at which they were then sold. Dimick limited the price at which the blankets were to be sold ; substantially, this is admitted by Dimick.

Hadden & Co. made strenuous efforts to sell at the prices named, but could not. Dimick says they could have been sold, but that is a mere opinion, and there is no evidence that he ever complained to the plaintiffs of any neglect on their part while the blankets were in their possession, or that he ever claimed to rescind the contract on that ground.

The plaintiffs consulted Dimick's interest in regard to sales. "Nothing was done without consultation with Mr. Dimick ;" and he knew the whole amount of blankets on hand unsold, up to the time of the final sale in August, 1862.

The reason why sales could not be effected was, that the Government was then largely importing foreign blankets, which shut out those of domestic manufacture.

In December, 1861, Dimick asked for further advances on these blankets. Plaintiffs had then on hand some \$10,000 to \$15,000 worth, which they could not sell ; as before stated, they declined to make advances on the blankets, on the ground that they could not sell them ; but offered to do so on goods that could be sold at auction. To this Dimick, it seems, did not assent, but told them he would have to stop manufacturing, which they said was the best thing he could do, as they did not want the blankets, and he accordingly did stop manufacturing for a time ; but they never declined to sell for him, and never told him that he could get somebody else to sell for him.

Accounts were rendered to Dimick by plaintiffs every six months, and he was always in their debt from \$2,000 to \$3,000.

In August, 1862 (when the balance of blankets on hand was sold by the plaintiffs to the Government as aforesaid), the United States were in the market for the purchase of domestic blankets, and had issued proposals inviting bids.

Dimick went to Haddens' and told them this, and that he intended to put in a bid ; he wished them (plaintiffs) to take Government pay, which, at that time, was half money and

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half certificates of indebtedness, and pay him as he delivered the goods.

Pott, one of the plaintiffs' firm, said he would sign a bond and deliver the goods to the Government, and take Government pay, and give Dimick the money as he delivered the goods for seven and one-half per cent commissions, if Dimick got the contract.

On the 25th of August, 1862, Dimick put in his first proposal or bid for 20,000 blankets at \$7.50 per pair, stating in his proposal that the blankets were sold in this city by Messrs. Hadden & Co., 340 Broadway, and pledging himself to enter into a written contract with the Government with good and approved securities, within ten days after notice that his bid had been accepted.

Subjoined to this proposal was a guaranty signed by John A. Hadden and Francis Pott in their individual names, to the effect that Dimick would comply with the terms of his proposal. This first bid or proposal was thrown out or rejected. Dimick then made a sample blanket and went with Spencer (the plaintiffs' salesman) to the assistant quartermaster, Col. Vinton, who told him he would give him a contract if he would make the blanket a little stronger.

A second sample was also rejected, but a third sample pleased him, and he gave Dimick a contract for 31,000 blankets.

This second bid or proposal, with a similar guaranty (not signed by any one), is set out at length (folios 83-87, inclusive of the case).

Spencer was with Dimick at the office of Col. Vinton when this bid was accepted. Col. Vinton said he would take the contract securities. Spencer told Dimick to send them to Hadden & Co.; he afterwards received a notice, as he says, from H. & Co. that the bonds and contract were ready, and it was necessary for him to go up and sign them. He and Spencer went up again to Vinton's, and took away the contract of Dimick with United States, and two blank security bonds.

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This contract with the Government and the bonds are set out at length (folios 89 to 102 inclusive, of the case).

Dimick then went to Hadden & Co., and signed the bonds. Up to this time, Dimick had no negotiation or conversation with Hadden & Co. or either of the members of the firm, in respect to their becoming sureties on any other bond than the first. Nor is there any evidence that Hadden & Co. knew that a second proposal was to be made. Dimick swears that Mr. Pott at this interview—Hadden being, he thinks, in the office at the time—said they would sign the bonds that day, and would send them back to Col. Vinton's office; that he told them he wanted them to sign them immediately, and that they said he need not take any trouble about it; that he must go to the mill, and go on with the blankets as fast as possible.

Mr. Pott expressly contradicts this; he swears that after the first bid was rejected, neither he nor any one of his firm told Dimick that they would become his sureties to the Government on any other contract; that he had but one conversation with Dimick about it, and declined to give security. Again, he swears that Dimick is mistaken about the interview he spoke of; that no interview of that kind took place; that Dimick never came to see them but once (on this subject), and that time they positively refused to become sureties.

And he gives his reasons for refusing. Again he swears, "I said from the very commencement that I would not give security upon that second contract."

In all this he is corroborated by Spencer, who was present at the interview. (See also testimony of Dimick, folios 105 to 110 inclusive, of the case). The names of John A. Hadden and Francis Pott are written in the body of the two surety bonds in question.

By whom this was done is not shown. Spencer thinks it looks like John A. Hadden's, yet he is not familiar with his handwriting, and he says it looks quite as much like the handwriting of two of the entry clerks. Whoever wrote in the names, did it without authority.

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Spencer had no authority whatever beyond that of salesman, and could not commit the firm to anything without consulting the firm. When he went to the quartermaster's with Dimick, he went simply as Hadden & Co.'s salesman, and with no other authority, and in that capacity did all he did do in procuring the contract. He knew nothing as to what facilities Dimick had for procuring sureties; he supposed he would get security, but did not know what his resources were; he did not know that Hadden & Co. would refuse to be his guarantors; he did not know anything about it. It is, therefore, not proved that Hadden & Co. ever promised or agreed to become security on the contract which Dimick actually made with the Government; but the very contrary is proved.

Dimick must have procured other sureties.

Under this contract he went on delivering blankets to the Government himself, during October, November and December, 1862, and January and February, 1863, without consigning them to Hadden & Co., and wholly regardless of his contract with them, to the extent (at the time this action was commenced—February, 1863) of 20,584 blankets, at \$3.75 a blanket, and received the pay for them himself directly from the Government.

In consequence of this, the plaintiffs wrote to Dimick the two letters set out at folios 115–16–17 of the case, dated October 20 and November 8, 1862.

Dimick had left off all communication with the Haddens since the 6th of October, 1862.

This suit was brought to recover damages for this breach of the contract.

The defense as stated by the defendant was as follows:

First. That the contract was void for the following reasons:

I. Want of mutuality.

II. Being in restraint of trade.

III. Being against public policy, as tending to deprive the government of the benefit of competition.

Second. That certain words written in pencil at the foot

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of the ink writing were part of the agreement, with which the plaintiff had not complied.

Third. That the written paper contained only part of an entire agreement in parol which embraced terms not fulfilled by the plaintiffs.

Fourth. That this written paper was obtained by misrepresentation.

Fifth. That the sale to the United States was made with the assent of the plaintiffs, and precluded them from the commission.

Sixth. That the plaintiffs refused or neglected to sell blankets which had been consigned, and the defendant was therefore excused from consigning more.

At the close of the testimony, the defendant's counsel asked the court to direct a verdict for the defendant upon the following grounds :

1st. That the written contract was invalid.

2d. That by its terms it did not prevent the defendant from selling himself.

3d. That the fact was undisputed that a sale was made to the United States by the defendant, in his own name, with the consent of the plaintiffs, and such a sale and the delivery consequent thereon, were inconsistent with the consignment of the goods to the plaintiffs.

But the judge refused so to direct the jury, and defendant's counsel excepted.

The defendant's counsel also requested the court to charge the jury :

1st. That if the jury find that the lines at the foot of the agreement made a part of the agreement they must find for the defendant, unless the plaintiffs complied with the terms mentioned in those lines.

2d. That if the jury find that the plaintiffs, after the making of the written agreement, unreasonably refused or neglected to sell the blankets of the defendant which had been consigned to them, upon the best terms that could be obtained, the defendant was excused from consigning to

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them any more blankets, and they should find for the defendant.

3d. That if the jury find that the plaintiffs, after the making of the written agreement, told the defendant that he might cease to manufacture blankets, and they did not want any more of them, the defendant was excused from consigning any more to them, and they should find for the defendant.

4th. That if the jury find that a new agreement was made between the plaintiffs and defendant for the sale of blankets to the United States, and in pursuance of which the defendant made a sale to the United States, the defendant is not liable, upon the written agreement in suit, for not consigning those blankets to the plaintiffs, and the verdict should be for the defendant.

5th. That if the jury find that the blankets in question could not have been sold to the United States, except upon a guaranteed proposal, and the plaintiffs refused to make or unite in such guaranteed proposal, and consented that the defendant should himself make such guaranteed proposal and sell accordingly, they cannot recover in this action.

6th. That even if the plaintiffs did not consent that the defendant should himself make such guaranteed proposal and sell accordingly, yet, if the blankets in question could not have been sold to the United States, except upon a guaranteed proposal, and the plaintiffs refused to render or unite in such guaranteed proposal, they cannot recover in this action.

But the judge refused to charge the jury as so requested by the defendant's counsel, on any of the said points, and the defendant's counsel excepted to such refusal, severally as to each of said points.

The action was tried before Judge ALLEN, November 18, 1863, and the jury, directed by him, to render a verdict for the plaintiffs for \$4,183.30, instructing them that there was nothing in the case for them to pass upon.

A motion was made on the judge's minutes for a new trial, and denied.

The appeal is from the order denying this motion, the

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judge having at the time directed judgment to be suspended until the hearing upon the case and exceptions at the general term.

JOHN H PLATT *and* JOHN SLOSSON, *counsel for plaintiffs.*

First. There is no disputed question of fact which could properly have been left to the jury. The only fact about which there is any dispute is the alleged promise of plaintiffs to become security on the defendant's bonds, to the contract, actually made by him with the United States government, and on that subject the testimony of Dimick (the only witness in that behalf for plaintiffs) is so overborne by that of Pott and Spencer, that no verdict which should find such a promise could stand.

Besides whether the plaintiffs agreed to become security or not, is, on the undisputed facts of the case, wholly immaterial, as will be hereafter shown.

Second. If the contract between these parties was a valid and entire contract, and had not been abrogated or rescinded, the delivery of the blankets by the defendant directly to the United States, and not through Hadden & Co., and receiving payment therefor directly from the Government, was a palpable violation of it on his part, and for which the damages claimed in this action are justly recoverable.

Third. The contract was a valid contract between the parties.

It was contended by defendant's counsel on the trial, and the question arises in his exceptions, that it was invalid.

1st. For want of mutuality.

2d. As being in restraint of trade.

3d. As against public policy, in hindering the Government, then at war, in getting blankets for the supply of the army.

Of each of these objections in their order.

I. Was the contract void for want of mutuality?

It was contended on the trial that it was not mutual, because there was no agreement on the part of the plaintiffs to receive the goods or to follow plaintiffs' instructions.

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This is not so. The contract commences: "It is hereby agreed between J. W. Dimick and Hadden & Co."

What follows, therefore, is to be referred to an agreement between the parties. Dimick on his part agrees to consign the blankets of his own manufacture for three years to Hadden & Co., so that he is bound, and they are to be so consigned, "to be sold by them" (Hadden & Co.); therefore, all goods consigned are by Hadden & Co. agreed to be received and sold. Dimick agrees to consign, and Haddens agree that he shall consign, and this for the purpose of being sold. Haddens therefore agree, when he, Dimick consigns, to receive and sell. It seems absurd to give any other interpretation to this contract. Dimick may possibly not be bound to manufacture blankets, but, if he does, he cannot sell them except through Hadden & Co.; and if he consigns them to Hadden & Co. for sale, they must be received by them "to be sold;" and if they do not sell, he has a clear remedy as for breach of an agreement. Under this agreement, every consignment imposes the duty of receiving and selling. Then there is a consideration to uphold Haddens' agreement, and the instrument is under seal. It was objected on the trial that the proof of the execution of the agreement by the defendants was not sufficient, it having been acknowledged by one only of the partners of plaintiffs' firm, and that therefore the firm was not bound by this contract (see exception at fol. 58). It is an answer to this that a parol authority from one partner to another to seal for him is sufficient, and that this authority may be inferred from the partnership itself and the subsequent recognition of the contract by the other partners (the proof in which respect is full in this case). Nor is it necessary that all the partners should be present. (*Gram* agt. *Seton*, 1 *Hall*, 262; *Renwick* agt. *McAllister*, 5 *N. Y. Leg. Observer*, 16; *Worrall* agt. *Munn*, 1 *Seld.* p. 240; *Smith* agt. *Kerr*, 3 *Coms.* 144; *Skinner* agt. *Dayton*, 19 *J. R.* 513; *Cady* agt. *Shepherd*, 11 *Pickg.* 400.)

Besides, both parties having acted under the contract, it is not in Dimick's mouth to make this objection, and he is moreover estopped by being present and acquiescing in the

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acknowledgement of the firm signature by Hadden. (*Fishmongers' Co. agt. Robertson*, 5 *M. & Gr.* 131; 1 *Pars. Con.* 373, &c. and notes; *L'Amoureux agt. Gould*, 3 *Seld.* 349.)

And, it may be here remarked, this circumstance of performance takes the case wholly out of the application of *Dorsey agt. Packwood* (12 *How. U. S. R.*), relied upon by the other side, even if that case ever had or could have any application or analogy to the present, which it has not. It is wholly dissimilar from the one at bar.

II. This is not an agreement in restraint of trade.

Contracts in restraint of trade generally are void; but those limited as to time, or place, or persons are valid. (*Palmer agt. Stebbins*, 3 *Pick.* 188; *Alger agt. Thacher*, 19 *Pick.* 51, and see authorities cited in a learned note, 2 *Pars. Con.* 254; *Dunlop agt. Gregory*, 6 *Seld.* 241; *Van Marter agt. Babcock*, 23 *Barb.* 633.)

This contract is reasonable, and the restraint (if it can be called such) is partial, and it is upon an adequate consideration. (*Dunlop agt. Gregory*, above; *Holbrook agt. Waters*, 9 *How. Pr.* 335.)

But, in truth, there is no restraint of trade about it. On the contrary, it is a contract inducing a more vigorous exercise of his trade by the defendant. The public cannot suffer, but would rather gain by the execution of the contract. It calls for a continued manufacture by defendant. The contract, in truth, amounts to nothing more than an agreement to employ the plaintiffs, for a limited period, exclusively as his agents to effect sales, on a consideration sufficient to induce the defendant to give the employment.

III. The objection that the contract is against public policy, as tending to hinder the Government in procuring blankets in time of war, does not require much comment. There being no restraint on the manufacture of blankets by Dimick, it is difficult to see how a sale of the blankets through the Haddens, could operate to the injury of the Government, who were at liberty to purchase of the latter as freely as any private person in the land. Such a doctrine would cut up, root and branch, all the thousand relations of consignor and

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consignee in respect to goods of which the Government might have need.

Fourth. The contract is entire. It is on its face complete, and expressed the will of the parties, and nothing appears to be omitted. The fact that Dimick inserted the words "including insurance from fire" in his own hand into the contract before signing it, should be conclusive that the agreement expresses all that the parties intended to express. It is in evidence also, that when the execution was acknowledged by both parties before the subscribing witness, not a word was said about any omission in the contract. Did Mr. Dimick say anything?" "Not a word."

It is necessary here to consider an offer that was made on the trial to interpolate something else into the contract. The answer sets up in substance that it was part of the agreement that the plaintiffs should make advances on goods (it does not say blankets), and that the written contract expresses only part of the agreement, and was obtained from defendant by the plaintiffs representing to him that they wanted it only for a particular purpose, viz., to show it to customers, etc., and was not intended by him, nor as he believes, intended by the plaintiffs as anything more than a partial statement of the existing agreement between them. This is positively denied by the reply, and the written paper is alleged to contain the whole agreement, both pleadings being under oath. On the trial, defendant's counsel offered to prove "that the previous parol agreement was made as stated in the answer, of which the written paper shows only part." The evidence was excluded, and the defendant excepted. His counsel also at the same time offered to prove "that this agreement was obtained from defendant by the misrepresentations, and under the circumstances stated in the answer." This was excluded and an exception taken.

Both these rulings were correct.

I. The rule is inflexible that where the written instrument imports on its face a complete expression of what the parties agreed upon, parol evidence is not admissible to add to or vary it. The offer seeks to incorporate a new and indepen-

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dent provision into an existing executed written instrument, complete in itself and as an additional, substantial original, stipulation of the contract itself.

This has never been allowed. (*See Cowen and Hill's notes*, 984, 3d vol. p. 1466, 1470, etc. in which the authorities are reviewed; *Durgin agt. Ireland*, 4 Kern. 322; *Renard agt. Sampson*, 2 Kern. 561.)

Fraud or mistake are not pretended.

II. Even if the contract had contained an agreement to make advances, there was no breach of it, for the evidence is full that large advances were made by plaintiffs to enable the defendant to complete his machinery. Pott swears they always advanced when asked to do so, until February, 1862, when finding the blankets would not sell, he expressed an unwillingness to advance on the blankets, but even then they lent him their note for \$5,000 on other security. Dimick admits that they were willing to make advances upon other goods. Now the answer does not pretend that this parol agreement was that advances were to be made on the blankets, but "by consignment or deposit of goods," so that if the parol agreement had been proved, it could not have availed defendant.

III. In this connection the defendant proved that at the foot of the written contract were four pencil lines, the two first illegible, but the last two with a little pains might be read to say "that the goods should be advanced upon by the paper of H. & Co. to the extent of one-half the invoice value."

The handwriting was not recognized, and Dimick swears he could not read the pencil marks, which is very strange, if he had ever put so important a memorandum there, or knew of one being there. The defendant's counsel asked the judge to charge the jury that if they found those lines made part of the agreement, they should find for the defendant unless the plaintiffs complied with the terms mentioned in the lines.

This the judge declined to do, and properly. It would have violated the rule of evidence above stated, and the evi-

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dence was too vague and unsatisfactory; and besides, two of the four lines were not proved at all. Nor was there any evidence that the lines were on the paper at the time it was executed.

IV. The parties acted under the agreement as it stands, without notice or complaint by either of the omission of so important a particular.

V. In respect to the second offer, it is enough to say that the answer does not set up any "misrepresentations." There is no allegation of fraud, or even of mistake. The offer was purely gratuitous, and unjustified by anything contained in the answer.

Fifth. The contract was never abrogated or rescinded.

This involves the propriety of the refusal of the judge to charge the fourth, fifth and sixth requests of defendant's counsel.

The fourth request assumes that there was evidence of a "new agreement" between the parties by which Dimick was to be at liberty to sell directly to the government, and not through Hadden & Co.

There is not a particle of evidence to warrant such an assumption, or on which a verdict in favor of it could be sustained (*See statement of facts*).

Indeed, in his first proposal to the government, Dimick says the blankets are "sold in this city by Hadden & Co., 340 Broadway."

This conclusively shows that in negotiating a sale to the Government, Dimick had no idea of departing from his contract with the Haddens, or of making any new agreement with them.

The plaintiffs' firm agreed to go security on the first proposal, if the contract had been awarded, and two of them signed the guaranty attached to that proposal. But that proposal was rejected, and a new proposal for a larger amount of blankets made. In respect to this, the plaintiffs absolutely declined to become security. They had not been consulted in respect to it. The whole negotiation was between Dimick, Spencer and the quartermaster. Spencer was not

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a partner, and had no authority to bind the firm. In this negotiation he acted merely as the plaintiffs' salesman, the same as he would have done had he been negotiating with an individual. The very fact that Dimick availed himself of Spencer's services, shows that he expected that the delivery was to be through Hadden & Co. It was for their mutual interest that a good customer should be procured. In fact the United States were the only customers they had yet found, for it was the Government who bought the large stock which had laid in their hands unsaleable up to August, 1862. That sale was expressly ratified by Dimick. The first that connects the plaintiffs with the second proposal by Dimick to the Government, and which resulted in a contract, was his asking them to become security. At this time the contract had actually been made with the Government. They declined at once to become such security. There was but one conversation on the subject. Dimick swears that Pott, Hadden being (he thinks) in the office (he does not say in his presence or within hearing), promised to sign the bonds. Pott swears Dimick is mistaken, and in this he is corroborated by Spencer, who was present.

The fact that they agreed to be security in the first proposal did not obligate them to become security in a second and much larger proposal, and about which they were not consulted. It was wholly optional with the plaintiffs whether they would sign the bonds or not. The evidence, therefore, wholly fails to support the fourth request to charge.

As to the fifth and sixth requests to charge, it is impossible to see on what ground they can be sustained.

There is no evidence whatever that the plaintiffs consented that the defendant should make a guaranteed proposal and sell accordingly (as it is expressed in the fifth request); that is, sell himself directly to the Government, and not through their intervention. The request treats this, and correctly, as a question of fact for the jury; as a question of fact, there was nothing to warrant its being sent to the jury. It would have been with the jury wholly a matter of speculation,

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without evidence of such a consent to guide them. Indeed, all the evidence is the other way.

As to the sixth request, the idea that as the blankets could not be sold without a guaranteed proposal, the refusal of the plaintiffs to become security, put an end, as matter of law, to the contract, is wholly unsupported in any principle known to the law.

Dimick was under no obligation to make this contract with the Government; having made it, he took the risk of getting security. The Haddens may be admitted to have acquiesced in the contract, but that imposed no obligation on them to give security. Their own contract did not provide that they should take any such risks as those, which signing these bonds would have imposed. They were to guarantee debts, but not the delivery of 30,000 blankets of a certain quality.

It is submitted that there was no rescission of this contract, in fact or in law.

There was certainly none in fact. There is not a particle of evidence to show that the Haddens ever assented to an abandonment of it, but just the reverse (see letters, folio 115, etc). This subject has been already sufficiently discussed; nor can a waiver or rescission be implied from any inconsistency between the agreement made between Dimick and the United States, and his contract with the Haddens, assuming that the latter assented to that agreement. There is no other ground than inconsistency between the two contracts, in which it can be pretended in this case that the law could imply or presume a waiver or rescission of the contract between these parties.

It is true the contract was signed by Dimick, and he became personally responsible to the Government that the blankets should be "manufactured and delivered;" but such delivery and the payment on delivery could as well be done through Haddens as by himself in person. There was nothing in his contract with the Government which required or rendered necessary a delivery by himself personally. It was perfectly immaterial to the Government, under this con-

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tract, who made the delivery, or to whom payment was made, provided it was on Dimick's account. If the Haddens, without Dimick's intervention, had originated this negotiation with the Government and got the contract for Dimick, and he had signed it just as he did, it wouldn't be pretended that in so doing they were acting as mere volunteers, and intended to abandon their contract with him, or that there was any inconsistency between their contract and the contract with the Government. They would have been only carrying out their own contract with Dimick by effecting a sale. It is true the character of the purchaser was such as to render a written contract with security necessary, but that would create no inconsistency between the two contracts in anything that related to their mutual obligations to each other, or in any other respect. Neither could Dimick say to the Haddens that they were bound to give security, because they had found the purchaser; and if he procured the security himself, there was nothing in that from which any presumption could arise or inference be drawn that the parties had mutually assented that their contract should be abrogated. This the parties must do, either in fact or by implication of law, to constitute a rescission. Neither can it be said that the promise of plaintiffs to become security on the first proposal enures to the second. That proposal was rejected, and Dimick was in no worse position than if it had never been made. After the rejection of the first proposal, the parties stood precisely as they did before it was made. The contract that was subsequently made by Dimick with the Government must be treated as though the first proposal had never been made. Where either party intends or wishes to rescind, on the ground of any default in the other party, he is bound to give prompt notice of his intention. If Dimick puts his refusal to abide by his contract on the ground of Haddens' refusal to become security on the second proposal, then he should have proved that he promptly notified them of his intention so to do, of which he has not given a particle of evidence.

Again, neither party can rescind unless the other can be

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restored to the condition in which he was before the contract was made, which Haddens could not have been, if it were true that Dimick was always in their debt from \$2,000 to \$3,000, as sworn by them.

It must be borne in mind that the defendant does not claim that he had a right to abandon his contract on the ground of any failure on the part of Haddens to perform any stipulation contained in it, but on the ground that they failed to carry out a parol promise to become security, which was wholly outside their contract with him.

This, if ever made (which we have already discussed), was a mere subsequent parol executory promise, which cannot abrogate a contract by speciality. (*Eddy agt. Graves*, 23 *Wend.* 82; *Nelson agt. Sharp*, 4 *Hill*, 584.)

There is no light in which this case can be viewed in which a case of rescission or abrogation, within the meaning of the law, of this sealed contract between the parties is made out. The case shows a willful abandonment by Dimick (suggested by anger or cupidity) of his contract with plaintiffs, without their consent and their protestation, and without any notice by him of an intention to rescind, or any fault found by him with the plaintiffs of any violation of the contract on their part. (2 *Pars. Con.* 192-2; *Hunt agt. Silk*, 5 *East.* 449; *Tartin agt. McCormick*, 5 *Sandf. S. C.* 366; *Lattimore agt. Harsen*, 14 *J. R.* 330; *Dearborn agt. Cross*, 7 *Cowen*, 48; *Dubois agt. Del. Canal Co.* 4 *Wend.* 285.)

Fifth. It remains to consider the other exceptions in the case.

In respect to the second and third requests to charge, it is sufficient to say:

As to the second, there was no evidence to warrant it, but, on the contrary, the evidence was overwhelmingly the other way. The evidence is clear that there was a limit fixed by Dimick to the price, and that the plaintiffs made strenuous exertions to sell, but without success, until they found the Government in the market. (*See statement of facts.*)

As to the third request, it gives to the testimony on which it is founded a wholly different meaning from what

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the evidence warrants (see evidence at folios 68, 69). Dimick, taking his own statements, wanted more advances, and he claimed that the plaintiffs were bound to make them on blankets, alleging that this was according to their agreement (of which, as already shown, there is no evidence whatever). Their answer (assuming Dimick's statement of it to be literally true) was this: "They said they could not sell the blankets, and the best thing I could do was to stop manufacturing—they did not want them." They offered to make advances on other goods, but defendant refused this, and said if they did not advance on blankets he would have to stop manufacturing.

It is perfectly evident that the plaintiffs, when they said "they didn't want the blankets," referred only to the security of blankets for advances.

This conversation occurred in December, 1861, and yet in August, 1862, we find Dimick again acting under his contract with the plaintiffs, and without ever having notified them of any intention to abandon the contract by reason of this refusal, which he was bound promptly to do if he had such intention. This was a waiver of any right to rescind. (*Lawrence agt. Dale*, 3 *J. Ch. R.* 23; *affirmed*, 17 *J. R.* 437.)

Sixth. The only remaining exceptions to be noticed are in respect to the question objected to and ruled out at folio 112; it is enough to say that it is wholly immaterial and irrelevant in any aspect of the case, and as the question speaks only of a refusal to carry out a "negotiation," and not a promise, it becomes of no significance whatever. The exception at folio 149 was to the overruling of defendant's objection to the question put by plaintiffs' counsel to the witness Pott, as to what advances their firm had made to Dimick. Now Dimick had himself already sworn on his direct examination all about these advances.

The exception at folio 162 is palpably without foundation.

The exception at folio 206, now referred to, is to the refusal of the court to direct a verdict for the defendant, on the second of the three grounds there stated, to wit: that the contract "by its terms does not prevent the defendant

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from selling himself." (The other two grounds there stated have been discussed under previous heads.)

This second proposition is based on the idea that the contract provides only for a consignment of the blankets to plaintiffs, and does not interfere with the right of the defendant to sell himself, to which it is enough to reply, that as all the blankets of his manufacture were to be consigned to the plaintiffs, and all were to be consigned to be sold, it is a little difficult to see how the contract allows Dimick to sell all or any portion of them himself.

Seventh. This disposes of all the exceptions taken by defendant's counsel on the trial or presented by the case.

Judgment should be entered for plaintiffs.

EMERSON & PRICHARD *and*

D. DUDLEY FIELD, *counsel for defendant.*

First. As the court directed a verdict for the plaintiffs, it is only necessary upon this appeal to show that there was evidence from which the jury might have found a verdict for the defendant. There was the following among other evidence :

The defendant testified (folio 67) that there was "such a change" that the plaintiffs "declined to sell blankets on time, and would only sell them for cash." They would not take the cash. They did not "know one day what another might bring forth." * * * * "They said they did not wish to go on and advance anything upon them ; they could not sell them." * * * * "I wanted to make arrangements to make a contract with the Government for a lot of blankets. I told them that the blankets they had on hand for the last year ought to be sold, and, unless they exerted themselves to sell them, I would take them myself and sell them ; that they could not lie any longer on hand." "I wanted the proceeds of these blankets to try and start my looms again, and get a contract of the Government. Mr. Pott told me he would send Mr. Spencer up and see if they could sell the blankets to Col. Vinton. I understood after-

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wards that they had effected that sale of the blankets, which would be about \$15,000, as they told me ; and then I told them I would put in a bid for a contract with the Government. I wanted them to take the Government pay, which at that time was half money and half certificates of indebtedness, and pay me as I delivered the goods, to enable me to buy my stock for cash. I would pay them some five per cent commission. Mr. Pott said that was not enough ; that if they took the certificates, they would likely lose one per cent, or there would be some discount if they carried them that would give only six per cent. Money was worth more than that. He said he would sign a bond and deliver the goods to the Government, and take Government pay, and give me the money as I delivered the goods, for seven and a half per cent, provided I got the contract. I told them I would look around the market, and see the highest I would have to pay for wool, and make an estimate what I would bid at. The time was short ; the bids would have to go in by the 25th August. I went the morning of the 25th August and filled out a proposition, which I signed and they signed.

“ Q. Where is that paper ?

“ A. I believe you have it.”

These papers were a proposal by the defendant to the United States to sell twenty thousand army blankets, and two of the plaintiffs signed an agreement, that if the proposal was accepted, the defendant would execute the contract with sufficient sureties. The proposal thus made was not accepted. The defendant then went to the United States Quartermaster again, who finally gave him a contract for thirty thousand. The defendant signed the contract. Bonds were made out for the plaintiffs to sign. Though they had promised to do so, they refused. The defendant says : “ I went from Spencer’s into Haddens’ office, and found Mr. Pott there, the partner ; asked him whether they had not signed the bonds ? He said, Government securities had gone down to ninety-seven ; they thought the matter over, and they were afraid they would be great losers by it ; that they might pay me on delivering the goods, and take

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Government pay, and not be able to get more than ninety cents on the dollar perhaps ; that perhaps they would not pay promptly. I suppose I staid there in the office from three-quarters of an hour to an hour talking with them. I told them it was too late. I had signed the contract, and that I had purchased stock to the amount of \$60,000, which I had to pay for in cash, in sixty or ninety days ; that I had depended on them for the money to pay it. He said they had made up their minds that they would not sign the bond to carry out the agreement ; that I might meet other parties, who would carry it out the best way I could. I reasoned with them as regards the signing of the bonds ; I told them that in case I failed to deliver the goods to the Government, the Government might come into the market, and they would hold me responsible for the difference between what they would have to pay, and what I had agreed to deliver them at. They said the Government securities were going down seven and a half per cent ; they would get nothing of it. I told them if Mr. Hadden was there he would do it. They said Mr. Hadden was on the way home, and if I would wait they would see what he would do about it. I told them I could not wait. Finally I asked them if I should wait until Mr. Hadden arrived if they would sign the bonds and carry out the contract. They said no, they would not guarantee anything. I might put the matter before Mr. Hadden and he might do as he pleased. After talking with Mr. Pott for three-quarters of an hour, or an hour, finally Mr. Pott made this suggestion : if I would indemnify them against losses, they would carry it out.

“Q. What do you mean by indemnifying them against loss ?

“A. By giving security upon my property, then they would carry out their agreement. I told them I could not do that, and got up and left the office. Prior to this I wanted them to go up to Colonel Vinton's with me, and see about the price. Mr. Spencer said he had been there once, and would not go there again. I wanted him to go and confirm my statement, that the price was to be seventy-five cents. I

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wanted Mr. Pott to go to see if they would lower the amount of the bonds. He declined to go ; they would do nothing ; they had become absolutely panic stricken."

The defendant then got other sureties and carried out his contract. If these statements were true the plaintiffs most surely are not entitled to seven and a half per cent for selling and guaranteeing the sale.

Mr. Pott, one of the plaintiffs, admits that they refused to sign the guaranty. He says : " Mr. Dimick never came to see us but once, and that last time we positively refused. Dimick then brought the contract to me upon that morning, and I refused to sign it because we were not willing to give security to the amount of \$90,000. I was not satisfied that he could make the blankets, and I did not think we were obliged to do it by our contract. During Mr. Hadden's absence, I did not like to go security for Mr. Dimick to that amount, and positively declined, and requested Mr. Dimick to give collateral security to cover us against any loss, and also to wait until Mr. Hadden came home, as we expected him that week, within two or three days. I did not think I had authority to go to that extent, knowing he had had so much difficulty to produce blankets that would be satisfactory to the Government. I stated that as a reason to him."

Second. The written contract should not have been admitted in evidence. It was void for want of mutuality.

1. The signing of a firm name, only one partner being present, is no sufficient execution of a sealed instrument.

No counterpart of it was ever delivered to defendant.

2. Even if duly executed there is no mutuality.

Plaintiffs agreed to nothing—not even to receive a single blanket.

They only agreed to receive a compensation fixed at the very highest rate of the market for similar services, with the addition of advances.

The paper contained nothing for defendant's benefit.

Plaintiffs were not even bound to obey defendant's instructions as to mode of selling, price, &c. (*See Dorsey agt. Packwood*, 12 How. U. S. R. 126.)

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Third. The court erred in excluding evidence that there was a previous verbal agreement between the parties under which they had begun to act, only a part of which was contained in the written paper.

That part of the agreement which related to advances was left wholly out of the paper.

Evidence of the verbal agreement relating to that subject ought therefore to have been admitted.

The general rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument" does not apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing. (1 *Greenleaf on Ev.* § 284 a.)

Fourth. The court erred in excluding evidence that this paper was obtained from defendant by representations on the part of plaintiffs, that it was wanted only for a special purpose—that it was obtained in the manner and under the circumstances stated in the answer.

Fifth. The written contract by its terms did not prevent the defendant himself from selling his own goods.

The true construction of it is that the defendant should not consign his goods to any other house—that the plaintiffs should be his exclusive consignees.

Sixth. If, however, the construction claimed by the plaintiffs should be adopted by the court, namely, that the defendant is prohibited by the contract from selling his blankets or disposing of them to the plaintiffs, then the contract is void as being against public policy and in restraint of trade. (*Chappel agt Brockway*, 21 *Wend.* 157 ; *Lawrence agt. Kidder*, 10 *Barb.* 641 ; *Dunlop agt. Gregory*, 6 *Seld.* 241.)

In *Van Marter agt. Babcock* (23 *Barb.* 633), the contract was sustained on the ground that the restraint was only local.

The principle should be enforced with special stringency against contracts made during a time of war restraining trade in an article of prime necessity to the army.

If such contracts were made to any extent and upheld by

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the courts, the Government might be seriously embarrassed in procuring supplies.

In *Lawrence* agt. *Kidder*, above cited, the court says :

“The law will tolerate no contract which on its face goes to prevent an individual for any time, however short, from rendering his services to the public in any employment which he may choose ; nor one which deprives any section of the country, however small, of the chances that the obligor may furnish to it the accommodation arising from the prosecution of a particular trade, unless it appear that the other party himself intends to and can supply such accommodation.”

It is pretty clearly shown in this case that Hadden & Co. did not intend to supply blankets to the Government of the United States.

Seventh. The court erred in refusing to charge, that if the jury find that the plaintiffs, after the making of the written agreement, unreasonably refused or neglected to sell the blankets of the defendant which had been consigned to them upon the best terms that could be obtained, defendant was excused from consigning to them any more blankets, and they should find for defendant.

Eighth. The court erred in refusing to charge, that if the jury find that the plaintiffs, after the making of the written agreement, told the defendant that he might cease to manufacture blankets and that they did not want any more of them, the defendant was excused from consigning any more to them, and they should find for the defendant.

An abandonment of a sealed agreement may be shown by parol or by mere acts or omissions of the parties.

In *Dorsey* agt. *Packwood* (12 How. U. S. R. 126), a release not under seal nor given for any consideration, was held to be competent evidence, going to show a voluntary abandonment of an agreement.

In this case we have the evidence of a mutual consent so to abandon, followed by the fact that defendant stopped his work in or before January, 1862, and did not make one

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blanket from that time until after his contract with the United States in October following.

It was a question for the jury whether such abandonment actually took place.

Ninth. The court erred in refusing to charge, that if the jury find that a new agreement was made between plaintiffs and defendant for the sale of blankets to the United States, in pursuance of which defendant made a sale to the United States, defendant is not liable upon the written agreement in suit for not consigning those blankets to plaintiffs, and the verdict should be for defendant.

The facts leading to and attending the new agreement must be looked at.

Whether with or without the advice or consent of plaintiffs, defendant's mills had been absolutely stopped in January, 1862, and not one blanket had been manufactured by him from that time—whatever may be the legal bearing of this fact, it practically annulled the contract of 1861. It is not questioned that defendant had a perfect right so to annul it, in any view of the case—and it would have lain dead forever and profitless to plaintiffs unless some new arrangement should be made.

In August, 1862, an opportunity offered to plaintiffs of inducing defendant to resume the manufacture and causing him to place himself in a position where he could not again, as before, discontinue at his option—this was by getting him committed in a contract with the Government of the United States, and for this purpose they opened new negotiations, the result of which was in evidence before the jury.

In brief, plaintiffs referred defendant to the head of their blanket department, Mr. Spencer, to carry out the plan; Spencer accompanied defendant to quartermaster's office and wrote out a bid; it was informal and rejected. After a few days Spencer and defendant prepared an amended bid, it was still insufficient; again, after a few days more they prepared a third bid. It was in Spencer's handwriting like the others.

The plaintiffs attempt to make a distinction between the

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original bid and the amended bids, and say that their agreement to give bonds, applied only to the original bid, and that they took care to have that made in such form that the Government could not accept it.

But the three successive bids were all made in answer to the one advertisement of the quartermaster. Plaintiffs never notified defendant that they would not sign, nor that Spencer's authority to assist him about getting a contract, was revoked.

They let defendant and Spencer go on upon the supposition that they would sign the bond until they had got defendant absolutely committed by the signing and delivery of a contract with the Government, and then when he could not draw back, they did.

1. The three bids were, in fact, but one bidding, the second and third being amendments and substitutes for the first.

2. Spencer was plaintiffs' agent throughout the transaction.

If there can be any doubt of this it should have been submitted to the jury.

3. By the consent of plaintiffs, never revoked, and under the guidance of plaintiffs' agent, defendant partially executed the new executory agreement, and in so doing of necessity bound himself to the United States.

4. This partial execution was irrevocable. Nothing that defendant or plaintiffs could possibly do could restore the defendant to the situation he occupied before.

He was now bound to make blankets ; before, he was not under the slightest obligation to make one.

5. When plaintiffs had got defendant so bound, and not before, they broke from the new agreement.

6. Plaintiffs can have no claim against defendant for agreed commissions on defendant's sale to the United States, because these blankets were never consigned to plaintiffs, and the agreement sued on applies only to consigned goods.

The items covered by it of guaranty, commission, storage

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and insurance never existed in the case of the goods sold to the United States.

7. Plaintiffs can have no claim against defendant either in the form of commission or of damages for failure to consign these goods, because defendant acted with the consent and co-operation of plaintiffs in putting it out of his own power to consign them to plaintiffs.

He who assists in preventing a thing being done cannot avail himself of the non-performance he has himself occasioned.

8. If plaintiffs have any claim against defendant in connection with the transactions stated in the complaint, it can only be for breach of the new agreement under which plaintiffs were to be allowed to receive the contract price from the Government. The merits of that claim are not involved in this action.

Tenth. The court erred in refusing to charge, that if the jury find that the blankets in question could not have been sold to the United States except upon a guaranteed proposal, and plaintiffs refused to make or unite in such guaranteed proposal, and consented that the defendant should himself make such guaranteed proposal and sell accordingly, they cannot recover in this action.

The remarks under the seventh point apply in the main to this one also.

Eleventh. The court erred in refusing to charge, that even if plaintiffs did not consent that defendant should himself make such guaranteed proposal and sell accordingly, yet if the blankets in question could not have been sold to the United States except upon a guaranteed proposal, and the plaintiffs refused to render or unite in such guaranteed proposal, they cannot recover in this action.

For the reasons given under the fourth point, the giving such an effect as plaintiffs claim to the contract sued on tended to prevent, and if carried far enough might seriously interfere with Government procuring articles of absolute necessity to the maintenance of its army in time of war.

Twelfth. If the defendant was liable for damages for

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breach of his contract, the court erred in directing a verdict for the sum of \$4,183.30. The court thus directed a verdict for the whole amount of the commissions which the plaintiffs would have earned under the contract, if they had sold the goods; whereas the measure of damages in case of liability is not what the plaintiffs would have received in gross, if they had themselves made the sale as consignees, but what their profit would have been, thus reducing the amount of their commissions by all those charges which under the contract they were to assume or pay, as insurance, storage, guaranty of purchase money, &c. Now it appears on their own evidence that they regarded the purchaser as a party, whose promise to pay they were unwilling to guarantee, and it is evident on their own statements, that, though they were willing defendant should make the trade, they were not willing to make the same sale themselves for the customary commission. The evidence tended to show that in their judgment their commissions would not cover the expense and risks of the transaction, including the guaranty, and if they were right in this, the damages would be nominal only. And it is no answer to this suggestion to say that if the goods had been consigned to them, they might have sold to other parties and so have made a profit, for the goods were sold to the United States with their consent, and without that consent would not have been made to be sold at all.

But even if the damages would not have been merely nominal, they would at any rate have been something less than the gross amount of the commissions; and so the question should have been submitted to the jury.

By the court, BARNARD, J. The agreement between the parties was properly admitted. It was duly acknowledged by one of the plaintiffs' firm, and by the defendant, to have been properly signed, and was attested by a subscribing witness at their request. It is clear that the partners authority to execute the sealed instrument was ratified by the subsequent acts of the plaintiffs under it, even if there was

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a failure of proof of authority existing at the execution of the paper.

The agreement was mutual—defendant agreed to deliver to plaintiffs “all the blankets of his manufacture, to be sold by them.” This must be fairly construed to mean that the plaintiffs agreed to sell the blankets which defendant should deliver them for that purpose, and the parties mutually agree upon the commission for such sales. The agreement was not in restraint of trade. No restriction is put upon the defendant; he may manufacture as largely as he will. Of course it was for the interest of both parties to manufacture and sell if a profit could be made.

The agreement did not permit the defendant to sell blankets of his manufacture himself without breach of the agreement; he had agreed to “consign exclusively” to the plaintiffs “all the blankets of his (defendant’s) manufacture.”

If the agreement is established and is not void, and did not permit the defendant to sell directly blankets of his manufacture, then as the defendant did sell the blankets as specified in the complaint, it has been broken, and some defense must be made to it or the plaintiffs are entitled to recover. The paper must be held to contain the true agreement between the parties. All preceding and contemporaneous agreements were merged into the writing, and it was therefore right to reject the evidence offered as to a previous parol agreement in addition to the writing itself. There remains but the alleged promise by the plaintiffs to be defendant’s sureties upon a contract to be obtained of the United States Government by defendant to sell his blankets to the Government. If this fact is true it is no defense.

The plaintiffs were not bound to guaranty that the defendant would make and deliver to the Government the blankets within the time and in the manner called for by the Government. They had the right to recede if they had promised. It can have no effect on this agreement. The plaintiffs, upon the whole case, were entitled to recover. There seems at the trial to have been no objection as to the amount of the recovery. A verdict was directed for seven and a half

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per cent on the sales to the Government. The plaintiffs were ready and willing to perform on their part, and that defendant made the sale without their assistance, and not through them, would not relieve the defendant from payment of the full commission.

Judgment affirmed with costs.

LEONARD, J. I concur with Judge BARNARD. When the plaintiffs told defendant that they would not enter into a guaranty of his contract to the Government, and that he might meet other parties who would carry it out the best way he could, the subject of the defendant's contract with the plaintiffs in respect to the consignment and sale of his manufactures was not under consideration. The defendant was urging the plaintiffs to become his sureties; they were unwilling to do so; represented to him the great danger of loss by the depreciation of Government pay. The defendant still urged them; stated that he had become bound himself by signing a contract with the Government, and had purchased sixty thousand dollars worth of stock, which he must pay for in sixty or ninety days, and that he depended on the plaintiffs for the money. Then the plaintiffs refused to sign the bond, and told him in substance that he might get other parties to become his sureties in the best way he could.

The plaintiffs, so far as the case shows, were under no obligation to the defendant to advance him money, or to become his security upon the contract with the Government. No doubt the defendant expected them to do so, and it is very probable that they had given the defendant encouragement that they would aid him in the manner he desired; but the contract between the parties did not call for it. The contract, however hard the rule, must be our guide. I can find nothing in this evidence which indicates an intention on the part of the plaintiffs to release the defendant from the performance of his agreement with them. What they said or did was not inconsistent with the performance of the contract with the defendant on their part, nor with insisting upon a like performance by him.

In the matter of Robert Martin.

The judgment should be affirmed. I have written my views on this point only, as the court concur wholly upon every other subject in the case.

INGRAHAM, P. J. I dissent upon the point as to the right of the plaintiffs to commissions on the goods sold to the Government. From the evidence, their consent to defendant selling to the Government might be inferred. If not, still there was evidence enough to submit to the jury the question whether the plaintiffs did not give such consent.

SUPREME COURT.

In the matter of ROBERT MARTIN.

A person arrested and detained upon an *order* from the war office at Washington, by authority of the President, directing "Robert Martin to be transferred to General Hooker for trial," will be discharged on *habeas corpus*, where from the return it appears that he is charged with the offense of *arson* in the night time, in the city of New York, in Nov. 1864, and also with being at that time within the Federal lines as a *Spy*; he being at the time an officer in the Confederate army, but disguising his rank and character in the dress of a citizen.

By the restoration of *peace*, and the *writ of habeas corpus*, the military law and rule has become, as before the war, subordinate to the civil.

Arson is not a crime for which a prisoner can be tried by *military court or commission*, without a disregard of the provisions of the constitutions of both the State and the General Government, securing a trial by jury.

There is no case where any person has ever been held or tried as a *Spy* who was not taken before he had returned from the territory held by his enemy, or who was not brought to trial and punishment during the existence of the war.

The prisoner, in this case, was not taken in the act of committing the offense charged against him of being a *Spy*. He had returned within the lines of the Confederate forces, or had otherwise escaped, so that he was not arrested till after the Confederate armies had surrendered, been disbanded and sent to their homes, with the promise that they should not be further disturbed, if they remained there and engaged in peaceful pursuits.

At Chambers, New York, December, 1865.

ON HABEAS CORPUS.

JEREMIAH G. LAROCQUE, *for relator.*

SAMUEL G. COURTNEY, *Assistant U. S. District Attorney,*
for respondent.

In the matter of Robert Martin.

LEONARD, J. The applicant is held as a prisoner by Major General Hooker, who commands this military department, under certain orders issued from the war office at Washington, by the authority of the President. The orders for the detention of the prisoner show no cause for the arrest, but the return of General Hooker on oath states that he is charged with the offense of arson in the night time, in the city of New York, November, 1864, and also with being at that time within the Federal lines as a spy, he being at the time an officer in the Confederate army, but disguising his rank and character in the dress of a citizen.

The question is whether the prisoner is so held by lawful authority?

We look in vain for the authority on the face of the process, where in civil cases it ought to be fully disclosed. Indeed, there is no process at all by which he is detained. It is simply an order, in the briefest terms, directing Robert Martin to be transferred to General Hooker for trial. If the offenses exist, and are of a purely military character, I do not question the sufficiency of these orders under the Code by which the arrest was made, and under which the military authorities propose to hold the prisoner for trial. The terms of proceeding for the arrest and trial of military offenders are not governed by the same rules for the protection of the rights and liberty of the person as are required in civil tribunals. The former is adopted from the necessity of the circumstances existing; often in camp; nearly always requiring summary action, and the exercise of large discretion.

The most direct language to express the intentions of the officer authorized by the usages of war among civilized nations to direct such momentous power must be considered sufficient, and not subject to criticism by civil jurists.

The offense of arson is one well known to the statutory law of every state, as well as at common law; but the offense of being a spy is not known to the civil or statutory law, and is one of a purely military character, cognizable only in time of war, and before a tribunal having its life, existence and

In the matter of Robert Martin.

authority created, continued and defined by purely military power.

I do not question that the crime of arson, even when committed in places remote from military camps, forts, arsenals or other places directly connected with military operations, as in the case of the prisoner, may be a military offense, and as such cognizable, in time of war, before a military court, by the usage and law of nations. The protection of the government and of its individual members makes war, armies and a submission to military rule in the community a necessity. When the necessity arises, the military power is paramount, and the laws are silent. But war is an anomalous condition. When peace is restored, or the necessity for military rule has terminated, the supremacy of the laws is restored.

During the late war for the suppression of the rebellion, it was deemed necessary by the military power to suspend the operation of the laws in the loyal states only so far as the privilege of the writ of habeas corpus was concerned. This measure was considered necessary in the exercise of the war power, for the public safety, and was for the most part, cheerfully submitted to by the people engaged in the avocations of civil life, far removed from the active operations of armies in the field, abiding with confidence the restoration of their civil rights, reasonably abridged only during the national peril. Now peace has returned. The President has recalled, by his proclamation, the suspension of the writ of habeas corpus. The restoration of this writ was a public acknowledgment by the military as well as the civil chief of the United States, that peace is established, and that the civil authorities in the loyal states are required to resume the exercise of the duties and functions that pertain to the conditions of peace.

The military law and rule has now become, as before the war, subordinate to the civil. The necessity for the sudden arrest, the instant visitation of vengeance, or the punishment of offenses known and regulated by statutory law, by the swift and hasty trial before a court martial or "military

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commission," has ceased within the limits of the loyal states. I do not now refer to that large class of offenses coming under the constitutional provision, authorizing congress "to make rules for the government and regulation of the land and naval forces," and "cases arising in the land and naval forces," such as mutiny, desertion, etc. These offenses constitute an exception to the provision that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

This allusion will suffice as an answer to the authority of *Martin* agt. *Mott* (12 *Wheat.* 19), so much relied on by the counsel for the respondent as controlling in the present matter. Time is wanting to review fully the legal authorities that have been cited by the learned counsel for either party, who have so nobly aided me in arriving at my conclusion. As an illustration of the exclusive jurisdiction of courts martial in cases arising within the land or naval forces of the United States, in time of peace, it is only necessary to refer to the extraordinary case of the *United States* agt. *Mackenzie* (1 *N. Y. Legal Observer*, 371), where it was held that the civil tribunals had no jurisdiction in the case of Captain Mackenzie, then on trial in the harbor of New York before a naval court martial, on a charge of murder on the high seas, on board the U. S. sloop of war *Somers*, by hanging three of the crew for mutiny. And as a further illustration that the military are subordinate to the law before a civil court, we can refer to the case of *Wilson* agt. *Mackenzie* (7 *Hill* 95), where trespass was maintained in the state courts against a naval officer for assaulting and imprisoning one of his subordinates, though the act was done on the high seas, under the cover of naval discipline. The case is very instructive, but I cannot now attempt anything more than a reference. I have no doubt but the act of congress withdrew the cognizance of crimes in the service from the courts of civil jurisdiction, and placed them in that of courts martial.

The act of congress creating "military commissions" seems to be a regulation of military tribunals by statute,

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and imposing a new name for courts martial, and defining certain offenses, some of which were not previously regarded as military offenses. The act was designed for a time of war and great national peril. It cannot be supposed that congress designed that "military commissions" should supercede civil tribunals in a time of peace. It required the suspension of the habeas corpus to enable such a commission to try any offense in the midst of loyal states, where it was cognizable in the civil courts. Nothing less could have relieved the state courts from the performance of the duties imposed by law and statute, of taking cognizance of all offenders against the laws of the loyal states, and bringing them to trial in the state courts to the exclusion of every military tribunal, whether called a court martial or "military commission."

In respect to the crime of arson, mentioned in the return of the distinguished general who is here the respondent, its location and description brings it exactly within the definition of that offense in the first degree contained in the statutes of the State of New York. The offense was committed in that city, within the jurisdiction of the criminal courts of the State of New York. It is the duty of every judge of the supreme court, and of every magistrate before whom a writ of habeas corpus can, by law, be made returnable, to take cognizance of such a crime when presented on proper proof, and commit the alleged offender to be proceeded against by law in the courts of this state.

I see no reason why the prisoner should not be tried for the offense with which he is charged, if the evidence is sufficient to make it the duty of a grand jury to find an indictment against him.

Arson is not a crime for which the prisoner can be tried by a military court or commission, without a disregard of the provisions of the constitutions of both the state and the general government, securing a trial by jury. If the writ of habeas corpus were now suspended, the judiciary of the state might be powerless to prevent such an infraction of the constitution, but the President has deemed it now

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proper to withdraw the restriction upon the power of the courts to issue that writ, and to restore to the community in which we live, the full blessings of peace, and the protection of the law.

The other charge alleged against the prisoner at this present time falls into insignificance, when contrasted with the horrible crime of attempting, with other confederates, to destroy the city of New York by fire, in the night, without regard to the inevitable destruction of human life among the tens of thousands of non-combatants, including youth and old age, who were exposed to the merciless vengeance of this supposed fiend.

It appears that the prisoner was not taken in the act of committing the offense charged against him, of being a spy. He had returned within the lines of the Confederate forces, or had otherwise escaped, so that he was not arrested till after the Confederate armies had surrendered, been disbanded and sent to their homes, with the promise that they should not be further disturbed if they remained there and engaged in peaceful pursuits. The offense of being a spy is cognizable exclusively by military tribunals, under the law of nations. Perhaps it required an act of the supreme law making power of the Government to fix this offense and its penalty upon a person owing allegiance to the United States, although engaged in rebellion and in arms against the lawful authorities. But the congress has not so extended the liability to punishment against the spy as to increase the time for its infliction beyond the period recognized by the laws of war among civilized nations. What particular act the prisoner committed, indicating that he was lurking or acting as a spy, except the fact that he was here in citizen's garb while holding an office in the armies of the rebellion, and attempting with others to set the city of New York on fire, is not specified.

I know of no case in modern history or in reports of cases decided in the courts where any person has been held or tried as a spy who was not taken before he had returned from the territory held by his enemy, or who was not brought

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to trial and punishment during the existence of the war. The lives of all rebels are forfeited when taken in an act of war or insurrection, and history affords innumerable examples of punishment by death being inflicted after armed resistance had been suppressed. Their pardon is an act of clemency by the rightful authority whenever the supremacy of the laws has been restored, without conditions having been obtained by those in rebellion.

It needs not any additional charge of having looked or acted as a spy, to exact the life of an offender under these circumstances.

The restoration of peace absolved all offenses by the public enemy committed during the existence of the war, so far at least as the acts committed are sanctioned by the laws of war, except in the case of rebellion, in which case the crime of treason still remains, and may be punished.

I am unable to perceive how the prisoner can now be lawfully arraigned before a military tribunal for the offense of being a spy. There is no constitutional power to pass any law authorizing such a trial, conviction and punishment as that contemplated in the case of the prisoner, especially within the borders of a loyal state. If he were charged with treason, neither the military commission or a court martial could lawfully entertain the charge. The crime of treason or of being a spy is not one of those within the constitutional provision for passing laws regulating the army and navy.

The affidavit of General Hooker, although founded on information and belief, is sufficient ground for holding the prisoner under the custody of the civil authorities of the state, until the evidence in the possession of the general government or the military officers can be produced before a grand jury or a committing magistrate.

I shall direct the prisoner to be discharged from the custody of the respondent, General Hooker, and that he be committed to the warden of the city prison.

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NEW YORK COMMON PLEAS.

KOEHLER agt. BROWN.

When a balance is struck between *copartners*, and a promise to pay is given, an action of *assumpsit* may be maintained by the partner receiving the promise. Where a society was formed, the object of which was to form a common fund out of which to pay each member drafted into the United States armies, a fair and equitable share of said funds, or furnish a substitute; and providing that in case no draft takes place, all moneys, less expenses, will be returned to each member:

Held, That the members of the society were *partners*. That the object of the creation of the society ceased when it appeared that no draft was to take place. The defendant, as treasurer, had the funds of the society in his hands, and promised to pay to the members holding certificates the balance due to them, determined upon by all the members in proper communion. An action for money had and received was therefore properly brought against him by the plaintiff for a balance due him as a member of the society.

General Term June, 1866.

Before DALY, BRADY and CARDOZO, judges.

APPEAL by defendant from judgment at special term.

THOMAS CUSHING and DAVID MCADAM, *for appellant.*

F. SMYTH, *for respondent.*

BRADY, J. The plaintiff and defendant were members of a society styled "The American Mutual Exemption Society," the object of which was to form a common fund out of which to pay each member drafted into the United States armies a fair and equitable share of said funds, or furnish a substitute. By the fourth article of their constitution, it is provided that on entering the society each member shall pay to the secretary the sum of thirty dollars, and a further sum of seventy-five dollars on or before the day prior to a draft. By the fifth article, it is provided that the secretary shall pay over immediately to the treasurer all moneys, taking his receipt for the same. By article thirteen, it is provided that, in case no draft takes place, all moneys, less expenses, will be returned to each member. The defendant was the treasurer of the society. The plaintiff paid to the secretary one hundred and twenty dollars, for four persons who have

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assigned their claims to him, and that sum was paid to the treasurer, the defendant, and deposited to the credit of the society, in the names of the plaintiff and defendant. The society duly passed a resolution directing the payment or return of the money paid by each member under the thirteenth article recited, in case no draft took place. No draft did take place, and the defendant, under and by virtue of that resolution, having received the moneys or funds of the society, paid to various persons moneys received from them, deducting five dollars from each member to defray expenses. All the questions of fact were submitted to the jury, under the charge of the justice, without exception, and the only question we are called upon to consider is whether the plaintiff, being a member of the society, could maintain this action against the defendant. The members of the society were partners. It was not formed under any general or special law of the legislature, and was nothing more, therefore, than an ordinary partnership. (*Townsend* agt. *Galway*, 19 *Wend.* 424; *Wells* agt. *Gates*, 18 *Barb.* 554.) The resolution to refund the money paid was virtually a dissolution of the copartnership. The object of its creation had ceased when it appeared that no draft was to take place. The resolution was also a settlement with each member of the association who paid the thirty dollars entrance fee, and a balance struck in his favor of twenty-five dollars—five dollars having been determined upon as the amount each member was to pay as his proportion of the expenses attending the organization and continuance of the society. The defendant recognized this action and order of the society, by payment in accordance with its terms, and promised to pay any further certificates presented to him. There is no reason why the defendant should not pay, it having been determined, as a matter of fact, that he had the funds in his hands to do it. When a balance is struck between copartners, and a promise to pay is given, there is no doubt that an action of assumpsit may be maintained by the partner receiving the promise. The rule is very old, and well established. The defendant had the funds of the

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society, and promised to pay to the members holding certificates the balance due to them—determined upon by all the members in proper communion. The action for money had and received was properly brought against him. The design of the society was the appropriation of money received for the benefit of its members upon a certain contingency, and when that contingency did not occur, and the society so declared, the money in the defendant's hands was a fund which, *aquo et bona*, he ought to pay over to those entitled to its return, when directed to do so by the society.

I think the judgment should be affirmed.

SUPREME COURT.

THE PEOPLE *ex rel.* THE FIRST NATIONAL BANK OF KINGSTON,
agt. THE BOARD OF SUPERVISORS OF ULSTER COUNTY.

THE PEOPLE *ex rel.* THE FIRST NATIONAL BANK OF RONDOUT,
agt. THE SAME.

THE PEOPLE *ex rel.* THE FIRST NATIONAL BANK OF ELLEN-
VILLE agt. THE SAME.

A writ of prohibition against a board of supervisors, commanding them to desist and refrain from any further proceedings in imposing or levying any tax upon the relators—a National bank, assessed or to be assessed upon their capital paid or to be paid in, will be refused for the reason :

First. That it is doubtful whether the board of supervisors have the power to alter the assessment rolls by striking out the name of any person or corporation which may have been placed upon it by the assessors.

Second. The writ of prohibition is not a writ of right, and is not granted as a matter of course ; but only on showing satisfactory grounds for relief, and it being made to appear that no considerable public inconvenience can arise from the delay. The writ should not issue where there are other remedies perfectly adequate.

All the tax payers in the county are interested in the assessment and collection of the taxes ; and the allowance of the writ against the board of supervisors might materially delay the completion of their business, and produce much public inconvenience. The taxes against the relators would have to be entirely abandoned, in a summary manner, with no legal mode of collecting them hereafter. The exercise of a sound discretion would leave the relators to pursue other legal

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remedies, if any such they have. If the assessors have exceeded their authority and acted entirely without jurisdiction, as claimed, then they are responsible for the damages which may ensue.

Albany Special Term December, 1864.

WRITS OF PROHIBITION were issued in favor of each of the relators against the board of supervisors of Ulster county, commanding them to desist and refrain from any further proceedings in imposing or levying any tax upon the relators, assessed or to be assessed upon their respective capital paid or to be paid in, returnable at special term; and that they show cause why they should not be absolutely restrained from any further proceedings to levy said tax upon each of the relators.

Upon the return day of the writs the counsel for the respondents moved to quash them, upon various grounds, which, so far as material, are discussed in the opinion of the court.

M. SCHOONMAKER, *for respondents.*

E. COOKE, J. HARDENBURGH *and*

S. L. STEBBINS, *for relators.*

MILLER, J. With the views I entertain, it will not be necessary to enter upon an elaborate examination of all the objections taken to the issuing of the writs of prohibition. There are some points urged which dispose of the whole case, and to the consideration of these I shall confine my remarks.

First. I have great doubts whether the board of supervisors have the power to alter the assessment rolls by striking out the name of any person or corporation which may have been placed upon it by the assessors. Their duties in reference to the equalization of the assessments and the correction of the assessment rolls, are especially provided for by the Revised Statutes (1 *R. S.* 1st ed. 395). Certainly there is no direct authority which confers upon the board of supervisors the right to interfere with the assessment rolls, which are before them, by changing any assessment upon them, unless the assessors have wilfully neglected to meet

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for review as required by law (1 *R. S.* 5th ed. pp. 911 and 912, § 19). Nor have I been able to discover any adjudicated case which decides that they have any such power. Several decisions were cited on the argument which look very much the other way, although, perhaps, the point was not distinctly presented. (*The People* agt. *The Supervisors of Chenango Co.* 11 *N. Y.* 575; *Mygatt* agt. *Washburn*, 15 *N. Y.* 321.)

The nearest approach to any decision in favor of the views of the relators counsel upon this subject, is the case of *The People* agt. *Works* (7 *Wend.* 486). In the case referred to, a writ of prohibition was granted at special term, *ex parte* by SAVAGE, J. restraining a collector from collecting a tax levied upon the town for purposes which were palpably illegal. In *The People* agt. *The Supervisors of Queens* (1 *Hill*, 201), BRONSON, J., in his opinion remarks, in referring to *The People* agt. *Works*, "that case must not be understood as having decided anything more than that the tax was illegal. He also concludes, "there is not the slightest foundation in the books for saying that a prohibition may issue to a ministerial officer to stay the execution of process in his hands."

I think that the case cited is not a sufficient authority to warrant the exercise of such a power against the board of supervisors of a county under the circumstances existing here, and it being at least doubtful whether they have authority to interfere with the action of the assessors as to the relators, writs of prohibition should not be granted against them for that reason.

Second. The writ of prohibition is not a writ of right, and is not granted as a matter of course; but only on showing satisfactory grounds for relief, and upon making it appear that no considerable public inconvenience can arise from the delay. (*Susquehannah Bank* agt. *Board of Supervisors of Broome County*, 25 *N. Y.* 315; *The People* agt. *The Supervisors of Allegany County*, 15 *Wend.* 198.) The granting of the writ rests in the discretion of the court, and it should not issue where there are other remedies perfectly adequate. (*Ex parte Braudlacht*, 2 *Hill*, 367; 36 *Barb.* 248.) All the

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tax payers of the county are interested in the assessment and collection of taxes, and it is not difficult to perceive that the allowance of these writs of prohibition against the board of supervisors, might materially delay the completion of their business, and produce much public inconvenience. Necessarily, the taxes against the relators must be entirely abandoned, with no legal mode of collecting them hereafter. This must be done in a summary manner without giving a full opportunity for that thorough investigation and examination of the legal questions presented, which their importance would seem to demand. The board of supervisors are not in fault, and are in no way responsible for the failure of the relators to bring up the case at an earlier period, during their sitting, or for the neglect to present it, when it arose upon the action of the assessors in placing the relators on the assessment rolls. Although the relators may be entirely free from blame, and present a sufficient excuse for their apparent neglect to institute proceedings to test the legality of the assessors action, there is no reason why the public or the board of supervisors should suffer by means of it. The exercise of a sound discretion would leave the parties to pursue other legal remedies if any such they have. If the assessors have acted entirely without jurisdiction, as is claimed by the relators' counsel, then there is a complete and adequate remedy at law against them after the tax is collected.

A subordinate officer must act within the scope of the authority committed to him, and if he exceeds it he is liable. If the assessors have exceeded their jurisdiction, then they are responsible for the damages which may ensue. (*The People agt. The Supervisors of Chenango Co.* 11 N. Y. 563; *Mygatt agt. Washburn*, 15 N. Y. 316, 321.)

It was urged upon the argument that the assessors might be insolvent, and hence the remedy might be inadequate. If a legal remedy is apparent and clear, I do not think that in disposing of a motion of this character, that we should, without any proof of the fact, take into consideration the

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remote probability of the insolvency of the parties who are liable.

It was suggested by the respondent's counsel, that in such a contingency, if the right was clear, the relators might, after the completion of the tax roll and the delivery to the collector, commence their action and restrain the collection of the tax. This question does not arise, and is not necessary to dispose of the case, and hence I do not deem it appropriate to express an opinion in reference to it.

If there was no jurisdiction whatsoever, as is most confidently insisted, and the board of supervisors have no authority, it is also questionable whether the warrant is not void and the collector liable, in an action to recover the property seized for the payment of the taxes (*The People agt. The Supervisors of Queens*, 1 Hill, 198).

If the views I have expressed are sound and correct, then the court would not be justified in awarding the writs of prohibition demanded, and after a deliberate consideration of the able and elaborate arguments of the counsel on both sides upon these motions, with the aid of such light as I have been able to obtain in the limited period allowed for its decision, I have arrived at the conclusion that a proper case is not presented for the relief asked.

It is, perhaps, to be regretted that in a case of so much interest and importance, more ample time could not have been enjoyed for its consideration; but under no circumstances should a remedy so controlling and effective, be summarily invoked where it must effectually prevent the collection of taxes imposed by competent officers, when other relief can be resorted to by those who claim that they are injured. The exercise of a sound discretion demands thus much caution, and I am satisfied no injustice can be done by withholding the remedy here asked. The application for the writs must therefore be denied, and the motion to quash granted, with \$10 costs in each case.

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SUPREME COURT.

THE ARTISANS' BANK, respondent agt. CHARLES C. BACKUS,
appellant.

A point which is waived and not argued by counsel at the hearing of the appeal, ought to be examined by the court on their own motion, if any member deems it a material ground for granting a new trial.

Where there is a conflict of testimony as to when and by whom *the alteration of the date of a note*, in suit, was made, which alteration is palpable on its face, it is a proper question to be left to the jury to decide, although the action is against the *indorser*.

A *notice of protest without date*, and not stating on what day the note was presented for payment, is not fatally defective for such omissions. (INGRAHAM, P. J., dissenting.)

It is not a discharge of the *indorser* of a note to take a mortgage from the maker by the holder, as security, without the indorser's assent, *if the time of payment is not extended*.

New York General Term, January, 1866.

Before INGRAHAM. P. J., LEONARD and BARNARD, Justices.

THIS action was brought against the defendant Backus as indorser of a promissory note made by James R. Gilmore, for \$5,120.70; this note was made and passed to the plaintiff to stand in the place of and to take up another note for the same amount, made and indorsed by the same parties, and which fell due the 7th day of November, 1857—the date of the note in suit, as the plaintiff claims. The first note, of which the note in suit is a renewal, was given for a loan made by the plaintiff. An alleged alteration of the date of the note, and an alleged contract by the plaintiff to extend the time of payment, and the alleged releasing of certain securities, constituted the defence.

The action was tried before Mr. Justice LEONARD and a jury, October 13th, 1863, and a verdict was rendered in favor of the plaintiff for \$6,957.86.

Judgment for plaintiff for \$7,403.25, was entered thereon, December 21, 1863, the defendant's motion for a new trial having previously (Dec. 18,) been denied at special term.

This appeal is from the order denying said motion, and also from the judgment.

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SANFORD & WOODRUFF, *attorneys, and*
L. B. WOODRUFF, *counsel for appellant.*

I. The motion for a non-suit should have been granted when the plaintiff rested. The alteration of the date of the note appeared upon its face.

The alteration was material—it affected directly the time when payment could be required.

When such an alteration appears, the note is invalidated unless it be shown by some evidence that the alteration was made before the note was issued, or that it was made by the consent of the parties to be affected by the alteration.

No such evidence had been given. (1 *Greenleaf's Ev.* 564; *Knight agt. Clements*, 8 *Ad. & El.* 215; *Cariss agt. Tatersall*, 2 *M. & G.* 890; *Clifford agt. Parker*, 2 *M. & G.* 909; *Waring agt. Smyth*, 2 *Barb. Ch.* 119, note; *Herrick agt. Malin*, 22 *Wend.* 388.)

II. The nonsuit should have been ordered at the close of the testimony, or the jury should have been instructed peremptorily that the defendant was entitled to a verdict.

1. It was shown that when the note passed into the hands of Mr. Platt, the president of the plaintiff, it bore date the 7th of November.

There was no evidence that the alteration was made by the consent of the defendant, Backus, the indorser.

Evidence, that when Mr. Platt delivered the note to the clerk, it had been altered, did not contradict the defendant's affirmative proof, or tend to show that the indorser consented to the alteration.

2. The true date of the note being, when indorsed by the defendant, November 8th, it became due 93 days thereafter, *i. e.* February 9th. No demand of payment was made on that day, and the indorser, the defendant, was therefore discharged.

3. The notice of protest was not sufficient to charge the defendant as indorser.

(a) The notice must show that the presentment was made at the proper time; and a mere general statement in a notice

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without date, that the note "is protested" does not so import. It may have been protested either before or after maturity. (*Wynne* agt. *Alden*, 4 *Denio*, 163; *Ransom* agt. *Mack*, 2 *Hill*, 587; *Remer* agt. *Downer*, 23 *Wend.* 626; *De La Hunt* agt. *Higgins*, 9 *Abb.* 422.)

(b) In *Cook* agt. *Litchfield* (5 *Seld.* 279), the notice stated that the note was protested "on the day that the same became due." And in *Youngs* agt. *Lee* (2 *Kern.* 552), the notice was dated as of the day when the note matured.

4. The testimony of two witnesses showed, without any contradiction, that the bank extended the time of payment of the indebtedness of Gilmore (for which this accommodation indorsement was held as collateral security) for the period of twelve months.

Gilmore testimony, folios 62 to 65. Accommodation indorsement delivered as collateral security. Gilmore, folios 66-68, 72-75, 91-94. W. R. Martin, folios 126 to 136.

The testimony of Gilmore and Martin proved the making of the agreement, upon an ample consideration, the performance of the agreement by Gilmore, the actual reception of the mortgages by the bank as valid subsisting securities and the placing the same on record. The retention of one of them for nearly two years (to April 6, 1860), and the possession of the other till the present time.

As matter of law upon this uncontradicted evidence the defendant was discharged (*Pitt* agt. *Congdon*, 2 *Coms.* 352).

5. The mortgage itself contains a clause which of its own force bound the bank absolutely to look to the mortgaged premises. This either released Gilmore or bound the bank to exhaust their remedy against the lands and so suspended their remedy against him. In either view it discharged the indorser.

6. The proof was alike uncontradicted and in part in writing, that the bank surrendered the mortgage for \$35,322.85, which was held as security for the same indebtedness of Gilmore. This discharged the surety, the defendant.

(a) The mortgage was acknowledged to be satisfied.

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(b) Or it was given up without satisfaction or payment. In either case the indorser is discharged.

III. The charge of the judge was erroneous, and he should have charged in relation to the notice of protest as requested.

1. The notice was not sufficient to apprise the defendant of a demand of payment on the day on which the note became due (*Authorities' supra*).

2. There was no conflict of evidence which made it proper to submit the questions to the jury whether there was a valid subsisting agreement for the extension of time for the payment of Gilmore's indebtedness, performed by him, by the delivery of the mortgages and their acceptance by the bank.

It was proved by two witnesses, and by the papers themselves shown to be in the plaintiff's possession. And there was no contradiction. (*Lomer agt. Meeker*, 25 N. Y. 361; *Dascomb agt. Buffalo and State Line R. R. Co.* 27 Barb. 221, 228; *Ernst agt. Hudson River R. R. Co.* 24 How. Pr. R. 97, *Court of Appeals September, 1862.*)

IV. Upon the proofs and the law as declared by the court the verdict is against both the law and the evidence.

V. The judgment and the order appealed from should be reversed and a new trial ordered.

A. PRENTICE, *attorney and counsel for respondent.*

I. Two questions only were litigated on the trial. Some minor points were made by the defendant, but only the two require any particular attention. These were, first, whether the date of the note had been altered since its indorsement and delivery; and second, whether the plaintiff ever made an agreement to extend the time of payment of this debt and subsequently surrendered security, of which the defendant was entitled to the benefit.

II. These two questions were both questions of fact for the jury; the court submitted both to the jury, and their decision was a decision of these as well as all the other issues submitted to them.

III. But these questions call for a closer examination.

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The evidence on the question of the alteration of the note is simply this: Backus, the defendant, says, he did not notice the date, and knows nothing about it.

Gilmore, the maker of the note, swears expressly, "I mean to tell this jury and all creation that I am a merchant, and I learned with my first A, B, C, not to alter a note, and I never did."

Again, at folio 90, this witness is asked if he ever made a mistake in the date of a note and then altered it? he answers, "Never, sir, I learned that lesson before I was twelve years old."

This was all the defendant's evidence of an alteration of the note.

(a) The plaintiffs' evidence was the fact proved by the defendant himself and Gilmore that this note was intended by both to bear date the day the first note fell due.

The testimony of Henry C. Tanner and Thomas Picton, both then clerks in the bank, that the note in suit had the same date as it now has when it came to the bank.

Also, the testimony of Wm. R. Martin, Henry C. Tanner and Thomas Picton, that the figure 7 made over the 8 is not in Mr. Platt's (the president) handwriting; the two latter also state expressly that it is in the handwriting of Gilmore, the maker of the note.

(b) This is the substance of the testimony on both sides as to the alteration, and it is submitted could leave no doubt on the mind of any person when or by whom the 7 was made over the 8.

IV. The evidence upon the alleged contract for extending the time of payment of this note is in substance this:

Gilmore says, "I was to give the bank security on a considerable amount of property in New Jersey, and the bank was to loan me \$10,000 on the property, I applying this \$10,000 to the improvement of certain property, the bank holding the title to that property while the improvements were going on. Thus, in that way, the bank had security for the \$10,000 new loan, and receiving the mortgage of \$10,000 and \$5,000 as additional security for the whole

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indebtedness " It should be remembered that this arrangement was made, as is alleged, between a man that is dead and this witness. Now let us see what was done and not done, as this witness says and the case shows :

1st. The first thing, and which was *not* done, is, the title of no land was ever put into the bank ; this, according to the witness' own story, was to be the first thing done, as the bank was to hold the title while the bank's money was expended in improving it. This was a condition precedent to any other step.

2d. The second thing, and which was *not* done, is, that no mortgage of \$10,000 and \$5,000 was ever made " as additional security for the whole indebtedness." This was also another condition precedent in the transaction, and was neither done or offered to be done by the witness.

3d. The third thing, and which *was* done, is, that two mortgages were executed entirely different in amount from that called for in the alleged agreement. These mortgages were each for \$35,000, upon two pieces of property ; whereas, the agreement sworn to called for only \$15,000 mortgage on a "*considerable* amount of property in New Jersey."

4th. The fourth thing, and which was *not* done, is, that the bank never advanced any portion of this \$10,000.

5th. The fifth thing, and which *was* done, is, that the bank returned one of these \$35,000 mortgages upon request, and without any payments being made ; and it is fair to be inferred, would the other if asked for.

6th. The sixth thing, and which *was* done, is, that a proposed agreement was drafted between the parties, but never executed by either. This agreement was wholly different from the one stated by the witness as the extension ; one called, among other things, for two mortgages of \$35,000 each ; the other for mortgages for \$10,000 and \$5,000, and for the title of the land to be improved to be in the bank.

V. It clearly appears from the above, and from other facts in the case not cited, that not one single *act* was ever done with the concurrence of both the parties, or even by either one of them, in accordance with the agreement Gilmore

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states. All that can be made of his statement of the agreement, is, that every act that was done at the time contradicted it, and all that can be made of the *acts* that did take place is, that they were never completed so as to be binding on either party.

(a) Gilmore, although attempting to carry this case on his own shoulders unaided, does not attempt to swear that the drafted agreement was ever signed by either party. Martin states expressly it never was signed.

VI. Such are the main points of the evidence the jury were called upon to credit, and upon which they were asked to say the bank had made a contract which would release this defendant.

Certainly there was evidence sufficient to require the court to submit the case to the jury.

If there was such evidence and the case was properly left to them to decide, then it is submitted this court should not interfere with their decision.

VII. The only question upon which counsel upon either side addressed the jury was, whether Gilmore could be believed or not. His testimony was given in a way to make any cautious man doubt his word. His manner was suspicious to the last degree.

If the court will refer to folios 80 and 81, they will see a sample of the witness' extravagant answers. These, with the acts done at the time, and Martin's evidence, made the jury disbelieve him. And, besides all this, he was seriously impeached by his denial of the alteration of the date of the note.

VIII. Several exceptions were taken on the trial, some of which I shall notice; others are not deemed of sufficient importance.

(a) A motion was made to dismiss the complaint at the close of the testimony, upon various grounds:

1st. That the note had been altered in date. We answer, this was a proper question on all the evidence for the jury; the result showed they thought not.

2d. The second ground of nonsuit was, that the note was

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protested on a wrong day. We answer this would be so, provided the note bore date on the 8th; but the jury said it did not, and their say is conclusive.

3d. The third ground of nonsuit was, that defendant had never received sufficient notice of protest. We answer, this notice contained nine distinct and positive assertions, and together gave all the information, and much more than the defendant was legally entitled to. They are as follows:

1st. That the instrument is a promissory note.

2d. That J. R. Gilmore is the maker.

3d. That the amount is \$5,120.70.

4th. That the date is November 7th, 1857.

5th. That it is payable at the Artisans' bank.

6th. That the time it has run is 90 days.

7th. That it is indorsed by you.

8th. That it is protested for non-payment.

9th. That the holders look to you for the payment.

The point raised on the trial was, that the notice did not say the note had been presented, or on what day the note was protested. We answer, the notice does say this in substance; it says it bore date November 7th, 1857, and had 90 days to run, and is protested. No conclusion can be fairly deduced from this, except that it was protested at the expiration of the 90 days.

This point was made the subject of a request to charge; but if the notice was sufficient, this request can have no more force than the exception.

It should be borne in mind that the certificate of protest was put in evidence; this showed that the note was presented February 8th, 1857, and payment demanded and refused. (*The Cayuga County Bank agt. Warden and al.* 1 Com. 413; *Bank of Cooperstown agt. Woods*, 28 N. Y. 545.)

4th. The fourth ground of nonsuit was, that the plaintiff made an agreement to extend the time of payment of this note. We answer, whether it did or did not, was a question on all the evidence for a jury. They said it did not, and their answer is conclusive.

(a) Whether this contract was ever made or not, and

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whether the note had been altered or not, were the only two questions upon which counsel addressed the jury on the trial.

The plaintiff claimed that Gilmore could not be believed, and the jury were of the same opinion.

5th. The fifth ground of nonsuit was, that the mortgage contained a clause which would release the defendant. We answer, this mortgage was, as defendant proved, a part of a proposition for a settlement never agreed to, and was to be a portion of the agreement never made, as the jury say. In fact, this position is but a subdivision of the fourth. The defendant did not pretend that this mortgage had any force, except as a part of this alleged agreement, which the jury did not believe was ever made (*Brackett agt. Barney*, 28 N. Y. 333).

6th. The sixth ground of nonsuit is, that the plaintiff gave up a mortgage which formed a portion of the security for the payment of this note. We answer, this mortgage had no force unless the agreement was made. The jury said it was not made. But the defendant is not a surety. He is an indorser. He would have no right of subrogation. And it makes no difference as between the plaintiff and this defendant that he is an accommodation indorser. (*Bradford agt. Corey*, 5 Barb. 462; *Sisson agt. Barrett*, 2 Comst. 406; *Edwards on Bills*, p. 293.)

IX. It is submitted, in conclusion, that the two questions of fact in the case, to wit: Whether the date of the note had been changed since it was signed by this defendant, and whether any agreement was ever concluded, extending the time of the payment of this note, were properly left to the jury; and that their decision is sustained by all the evidence in the case, and the judgment should be affirmed.

By the court, BARNARD, J. The question of the alteration of the note was one of pure fact for the jury. The learned justice who tried this action could not have withdrawn the question from their consideration. The notice of protest was sufficient. It described the note by giving its amount,

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date, and the time it was to run, and that it was protested for non-payment. The inference is, that it was demanded and protested on the day it became due (*Young agt. Lee*, 2 *Kern*. 551). The only remaining question is as to the discharge of the defendant Backus, by reason of the bank having extended the time of payment to Gilmore, the maker of the note. Gilmore testifies to a verbal agreement with the president of the bank, that the bank was to advance him \$10,000, and take mortgages on certain real property for this advance and the old indebtedness, which included this note in suit, and extend the time for the payment of the old debt for one year; that this agreement was reduced to writing by the attorney of the bank, but was never signed by either party; that the mortgages were given in pursuance of this agreement by Gilmore to the bank; that the bank never advanced the money. One of the mortgages given was subsequently canceled by the bank, which cancelation, with the mortgage, was accepted by Gilmore without in any way being paid. This mortgage was introduced in evidence, and shows no extension of time of payment to Gilmore, but is payable on the instant of its execution. The parol agreement, if one was made, was merged in this mortgage, and that only expresses the true agreement between the parties (*Burbank, President agt. Beach*, 15 *Barb*. 326). There is, therefore, no sufficient proof that the time of the payment of the note was ever extended by the bank to Gilmore. It was not a discharge of Backus to take this mortgage to secure the note in question, and to re-deliver it to Gilmore without Backus' assent and without payment, if the time of payment was not extended (*Pitts agt. Congdon*, 2 *Comst*. 352).

Judgment affirmed, with costs.

LEONARD, J. The case shows no request to charge on the subject of the alteration of the date of the note, and no motion for a nonsuit on that ground at the close of the evidence, and nothing in the charge as contained in the case referring to it; the inference may be fairly drawn, either that the question was properly submitted to the jury, or

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wholly waived by the defense after the evidence was all before the court.

The counsel for the defense waived all argument at the hearing of the appeal, in respect to the motion for a nonsuit at the close of the plaintiff's evidence, but it has been considered by a member of the court as a material ground for granting a new trial, on the motion of the court only, and I shall therefore refer to it more at large. The subject is on the defendants' points, but counsel expressly stated that he should not argue it. The question raised by the motion was whether the burden of proof rested upon the plaintiff to explain an alteration of the date of the note.

The alteration was without any attempt at concealment or disguise, which usually attends a fraud; the figure 7 being plainly written over an 8, and affecting the period of maturity only one day, seemed rather an unimportant subject of fraud, under the circumstances of the parties, the bank officers being merely trustees. The presumption of law is in favor of innocence. It is stated in *Greenleaf on Evidence* (§ 564), that "generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument." An exception to the rule of the presumption of innocence seems to be admitted by the English authorities in the case of commercial paper, the holder being required to explain every apparent and material alteration operating in his own favor.

The contrary rule has been held in some cases in the United States, *Davis agt. Jenney* (1 Met. 221), holding that the burden of proof was on the defendant. In *Cowen & Hill's Notes* (2 vol. p. 299, note 298), it is said to be quite doubtful how far these decisions will be followed by the American courts. The direct contrary has been holden in New Jersey (*Cumberland Bank agt. Hall*, 1 Halst. 215).

In *Rankin agt. Blackwell* (2 Johnson's Cases, 200), it is said by the court that "alterations on the face of a note, unsupported by other proof, would not be competent evidence, it having been insisted by the defense that the jury might

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decide from such evidence whether the note had been altered or not."

In *Tillou* agt. *The Clinton & Essex Mutual Insurance Co.* (7 Barb. 568), Judge BARCULO says, it has long been a disputed point whether the burden of explaining an alteration apparent upon a paper devolved upon the party seeking to enforce it, or the party sought to be charged. But when the alteration is suspicious, and beneficial to the holder, the more sensible rule prevails, at least in this state and in England, that the presumption is against the party who sets up the paper. (*Vide also Bailey* agt. *Taylor*, 11 Conn. R. 531.)

In my opinion the ruling was correct under the circumstances of this case, but if not correct, the defendant did not rely upon his objection, but proceeded to give evidence on the subject, which was followed by other evidence on the part of the plaintiff, so that the fact became material to be submitted to the jury, and could not be determined as a question of law. A new trial will not be granted, on the ground that a nonsuit was refused when the plaintiff rested on insufficient evidence, if the necessary proof is afterwards supplied. (*Schenectady & Saratoga Plankroad* agt. *T. Hatcher*, 11 N. Y. R. 102 and 112; *Lansing* agt. *Van Alstyne*, 2 Wend. R. 561; *Breidert* agt. *Vincent*, 1 E. D. Smith, 542, 544.) The facts subsequently appearing were that the note was drawn by Gilmore, the maker, and indorsed by the defendant Backus, who delivered it to Mr. Platt, the president of the bank, to take up another note for the same amount, made and indorsed by the same parties, and held by the bank, which fell due on the 7th day of November, 1857, upon which day the note in suit, as altered, also bears date. Backus, the indorser, did not notice the date at all at the time he delivered it to Mr. Platt, who died sometime before the trial. Gilmore testified that the alteration was not made by him, and he did not know who made it. The 8th of November, 1857, fell on Sunday. The note was antedated and delivered to the president some days after the time it bears date. Mr. Platt delivered it seventy-six days before maturity to the discount clerk of the bank, who testifies that

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the alteration was then upon the note. Three witnesses, who are well acquainted with the handwriting of Mr. Platt, testify that the figure is not in his handwriting, and two of them, being acquainted with the handwriting of Gilmore, the maker, testify that the figure is in his writing. There were some circumstances in the evidence of Gilmore, tending to impair his credit as a witness. The body and date of the note, as at first drawn, were in the writing of Gilmore, and he intended to have it bear date the same day that the former note fell due.

Under this evidence, it was clearly a question for the jury to determine by whom the alteration was made, and whether before or after the indorsement by the defendant. The maker never had the possession of the note after he signed and delivered it to the indorser. In my opinion the evidence sustains the verdict, and that the alteration was contemporaneous with the making and indorsement.

The sole remaining question upon which the members of this general term have any difference of opinion, relates to the sufficiency of the notice of protest.

The only possible defect which can be attributed to this notice is the omission to date it. New York is stated in such relation as to appear to be the place where it emanated, but the day, month and year are omitted. The rule is laid down by Judge WRIGHT as to the facts necessary to appear in a notice of protest in the case of *Hodges agt. Shuler* (20 N. Y. R. 114, 118). He says, in that case, "a notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but is not necessarily invalid. It is invalid only when it fails to give that information, which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored note, he will be charged. A note is well described when its maker, payee, date, amount and time and place of payment are stated. In that case the note was made by a railroad company, but was described in the notice as made

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by "S. Henshaw, treasurer," and it was held sufficient, although conceded to be a misdescription of the maker, on the ground that it appeared that the indorser was not deceived or misled thereby. In the present case all these particulars are fully complied with.

The notice states that the note is dated "November 7, 1857." The jury found that to be the true date, and that there had not been any fraudulent alteration. The notary proves the time and manner of service, and the defendant does not deny that he received the notice in due time, assuming the true date of the note to be the 7th and not the 8th of November, 1857. The name of the maker, the fact that the defendant is the indorser, the amount, the date, the place of payment, and the time (90 days) are all exactly furnished in the notice.

The time of service was correct, and the defendant received the notice. I am unable to perceive that anything was omitted to apprise the defendant of every requisite in respect to the demand and neglect or refusal of payment by the maker, so as to charge him as an indorser. Had the jury found that there had been an alteration in the date of the note after its indorsement by the defendant, there would have been a failure to serve the notice on the proper day. But this defense of a defective notice would have been unimportant had the jury found for the defendant on the question of alteration, as the note would have been void on that ground.

We must now assume that the true date of the note was that mentioned in the notice. The service was then regular as to time, and the notice contained every essential statement necessary to apprise the defendant that the note which he had indorsed for Gilmore had been protested.

The omission to date the notice cannot mislead where it is served on the proper day. The notice is given at the proper time. There is no evidence that the defendant had indorsed any other note of a like description. We cannot infer that there were others similar to it (*Young agt. Lee*, 2 Kern. 551.)

The judgment should be affirmed, with costs.

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INGRAHAM, P. J (*dissenting*). It is very clear that when the plaintiff rested there was no evidence to submit to the jury on the question of the alteration of the note. The action was against the indorser. The note on its face showed an alteration of the date by writing 7 for the day of the month over 8. No explanation was given of the alteration, and the indorser was sought to be charged on a presentation of the note on the 8th of February, being a recognition by the notary of the 7th of November as the correct date of the note. The liability of the indorser depended on the true date of the note. If the note, when indorsed by him, was dated the 8th, then he could only be made liable by a protest on the 9th of February. If the 7th is adopted as the date of the note, the mode of alteration and the fact of such alteration having been made when the defendant indorsed it must be shown, to hold him liable as indorser. When commercial paper is altered in anything material, the onus rests on the holder to show that such alteration was properly made. As no evidence was given on the subject of the alteration when the plaintiff rested, the case should not have gone to the jury, and the defendant's motion to dismiss the complaint should have been granted.

Was there any evidence given afterwards to alter the state of the case?

The defendant was sworn, and testified that he did not make the alteration; that he did not know who made it, and the first time he saw it was in December, 1860; that he never authorized the alteration to be made; that he received the note from Gilmore, and indorsed it and took it to the Artisans' Bank, and gave it to the president.

Gilmore, the maker, was sworn, and testified that the note was dated the 8th; that he did not make the alteration; that he did not know who did; that he did not authorize any one to do so, and had no knowledge of it until three years after the date of the note.

On the part of the plaintiffs it was proven that the note had been altered before it became due, and was not altered afterwards; that it came to the hands of the discount clerk

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when discounted, and that it then bore the same date as now, and was not altered afterwards. It was also proved that the alteration was not made in Platt's handwriting, and was in Gilmore's handwriting. Upon this evidence the question was submitted to the jury. If the action had been against the maker, the evidence would have been submitted properly to the jury as to his liability, but I am at a loss to see anything that brings home to the indorser any knowledge of this alteration. He utterly denies all knowledge of it between the indorsement and the trial, and the only fact on which he is sought to be made liable, is his delivery of the note indorsed by him to the president. There was a period of time when the alteration might have been made not reached by any of the witnesses, viz.: after its delivery and before it was passed by the officer of the bank to the discount clerk; and whether such alteration was made by Platt or by Gilmore would be immaterial. If without the knowledge of the defendant, he would not be chargeable.

I have noticed these facts more at large, as bearing upon the question as to the sufficiency of the notice of protest. The notice of non-payment was not dated. It stated that a note dated 7th November, 1857, and indorsed by the defendant, was protested for non-payment. There is no proof from the defendant as to the day of service, which might perhaps supply the difficulty. The only evidence was the notary's certificate that on the 8th February, 1858, he served the notice by mail.

This case very much resembles that of *Wynne* agt. *Alden*, (4 *Denio*, 163), except that the point decided in that case is presented more strongly by the notice proved here. There the notice was without date, and stated that the note "had this day been presented for payment and payment refused."

The court held the notice defective; saying, the notice being without date, it is impossible to ascertain from the paper itself what day in particular was intended.

In *Ransom* agt. *Mack* (2 *Hill*, 587), it was held that whether the notice was sufficient was a question of law (*Rennie* agt. *Downer*, 23 *Wend.* 720).

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In *Dela Hunt* agt. *Higgins* (9 *Abbott*, 422), it was held that an error in the day on which the note was protested was fatal. The cases of *Cook* agt. *Litchfield* (5 *Selden*, 279), and *Youngs* agt. *Lee* (2 *Kernan*, 552), were cases in which the date and other matters were all stated but some defect alleged as to the day of protest. In *Home Ins. Co.* agt. *Green*, a notice which omitted the maker's name was held insufficient to charge the indorser.

In *Hodges* agt. *Shuler* (22 *New York*, p. 115), WRIGHT, J., in speaking of the sufficiency of the notice, says, "a notice is well described when its maker, payee, date, amount, and time and place of payment are stated." Such should be the contents of the notice. But some of the cases have, from time to time, sought to avoid the hardship of holding a notice defective for any of these requisites having been omitted, if they could find something else to show that the party was not misled or left in ignorance. Thus, where the maker and indorser's names were misplaced, it was held not to mislead, because the error was known to the indorser. So the want of saying that the payment of the note had been demanded and refused, was considered cured by saying the note was protested, and the holder looked to the indorser for payment. So in cases like this, the want of stating the day on which payment was demanded, was relieved by the date of the notice being on the day the note became due. But in no case has it been held that a notice without date, and not stating on what day it was presented for payment, was sufficient.

It seems to me this notice was insufficient for want of a date, or for want of stating the day of demand in the body of it, and that a new trial should be granted.

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SUPREME COURT.

ABRAHAM L. ACKERMAN agt. HAMILTON H. SALMON and
EMILIE M. SALMON.

An action by a judgment creditor to reach real estate conveyed to the wife of his judgment debtor, a part of the consideration for such conveyance being paid by the judgment debtor, who is alleged to be insolvent, cannot be sustained, where the presumption of fraud, which attaches by reason of the payment of such consideration, is overcome by the evidence.

And evidence tending to show that the debt to the plaintiff was contracted by a partner of the judgment debtor, of which the latter was ignorant at the time he paid the consideration money, and that the plaintiff made no claim against him personally till after the conveyance to his wife, was properly admissible to show the want of a fraudulent intent on the part of the defendants.

New York General Term November, 1865.

Before INGRAHAM, P. J., BARNARD and LEONARD, justices.

THE plaintiff is a judgment creditor of the defendant, Hamilton H. Salmon, but not of the defendant Emilie M. Salmon. Execution against H. H. Salmon has been returned unsatisfied. The judgment was recovered against H. H. Salmon and one John Mears, as copartners, and was recovered March 17, 1857, and was for goods sold to John Mears between February 22, 1856, and April 14, 1856. In the summer of 1856, the defendant, Emilie M. Salmon, wife of H. H. Salmon, purchased a house and lot in New York city. The plaintiff claims that at the time of this purchase H. H. Salmon was largely insolvent, and that such purchase was, in fact, made for his benefit and by him, and with intent to hinder, delay and defraud his creditors, and asks that his judgment be decreed to be a lien upon said premises, that they be sold and the judgment paid.

The defendants admit the purchase of the house and lot, but say that the firm of Wm. H. Newman & Co. and Emilie M. Salmon furnished the money, and that the property was purchased for her sole use and benefit.

They deny the allegation in the complaint that the deed of the premises, though bearing date March 8, 1856, was not executed for several months after that time, and they

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deny any fraud or fraudulent intent whatever. And they allege that at the time of the purchase, H. H. Salmon was perfectly solvent (worth over ten thousand dollars), and they then deny each and every other allegation in the complaint.

The referee (ex-judge Alfred Conkling) rendered judgment for the defendants.

E. R. BOGARDUS, *for appellant.*

I. The appellant was a creditor of H. H. Salmon at the time of his advancing money for the purchase of the premises, taking conveyance in the name of his wife.

Such fact makes such conveyance presumptively fraudulent. (*Mead agt. Gregg*, 12 Barb. 653; *Van Wyck agt. Seward*, 18 Wend. 375; *Ward agt. Robinson*, 22 N. Y. Rep. 564.)

The fraudulent intent was not disproved in this case.

II. Subsequent creditors may impeach such conveyance. (12 Barb. 653; 18 Wend. 375.)

The evidence (uncontradicted) does impeach the conveyance to Mrs. Salmon.

The defendant H. H. Salmon, not only paid the purchase money for the conveyance to his wife, but pledged his future earnings in payment of the moneys advanced for that purpose, and also transferred in payment thereof the property acquired from plaintiff upon which his judgment is based.

III. The referee erred in overruling the plaintiff's objection at folio 65.

IV. The referee erred in refusing to find matters of fact and law as required by the plaintiff's counsel.

V. The conclusions of law by the referee are not warranted by his facts.

VI. Even if the judgment debtor had a right to make a reasonable settlement upon his wife, the evidence shows clearly that Mr. Salmon's settlement was not within the spirit of adjudications relied upon by him upon this point. He had no property at the time which he had the right to settle upon his wife.

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VII. The judgment should be reversed and new trial granted.

ANDREWS, COLBY & THOMPSON, *attorneys, and*
GEORGE R. THOMPSON, *counsel for respondents.*

I. The plaintiff's evidence utterly fails to show anything to establish either of the following allegations in the complaint, viz :

First. That the defendant was insolvent, or expected to become insolvent, at the time the purchase of the house and lot in question was made.

Second. That the purchase was made with intent to place his property beyond the reach of creditors, or to hinder, delay or defraud creditors.

For the evidence on these points, see the case.

This is every particle of evidence offered by plaintiff to sustain either of the above allegations, and it is submitted that so far from proving them to be true, it shows the contrary.

(a) On the other hand, it appears that the purchase was, at any rate, *bona fide* in its inception, as it was made long before any account was opened by Mears with the plaintiff.

Purchase in December, 1855. Debt to plaintiff, from Mears, or Mears & Salmon, April, 1856.

It is admitted that the goods for which the judgment was obtained against Mears & Salmon, were sold to Mears, and charged to him, "John Mears," and "John Mears' Union Color Works," and that neither the plaintiff nor his clerk ever saw Mr. Salmon, and that Salmon was not notified by the plaintiff of the sales, nor was any demand made upon him until August 12, 1856, which was long after the payment of all the purchase money for the house and lot.

The purchase was made notoriously and openly by Mrs. Salmon. The purchase money had been partly paid before the plaintiff's claim existed, even against Mears, and was all paid before Salmon was notified of the existence of the

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claim. The conveyance was made to Mrs. Salmon absolutely.

(b) The plaintiff's evidence shows how and when H. H. Salmon became insolvent.

II. The statute in relation to conveyances presumptively fraudulent, will not avail the plaintiff (*R. S. 5th ed. vol. 3, p. 15, §§ 51 and 52*).

(a) By that section a conveyance made to one person, the consideration being paid by another person, is presumptively fraudulent against the creditors, at the time of its payment, of the person paying the consideration. The consideration of this conveyance was paid before the accrual of any debt from defendant, H. H. Salmon, to the plaintiff (*See previous references*).

(b) At any rate, the statute only shifts the burden of proof from the plaintiff to the defendants, and for the reason stated under the first point, any presumption arising under this statute is successfully rebutted.

(c) The statute does not apply to a case like this.

III. The presumption of fraud, if any, may be repelled by circumstances. (*Seward agt. Jackson, 8 Cowen, 406; Hinde's Lessee agt. Longworth, 11 Wheat. 213.*)

(a) The doctrine sustained by the case of *Reade agt. Livingston* (3 Johns. Ch. 492), has been overruled by the case of *Seward agt. Jackson*, above cited (*See also, Hamilton agt. Greenwood, 1 Bay, 173*).

IV. The question of fraud is one of fact, and the findings below will not be disturbed by the court on appeal.

(a) Especially so when the plaintiff becomes a creditor subsequent to the payment of the consideration.

V. An exception was taken by plaintiff's counsel, to the ruling of the referee, allowing the introduction of evidence to show that no claim was ever made against H. H. Salmon, by plaintiff, until after the conveyance in question, and that Mr. Salmon was not informed of the existence of the claim at the time of the conveyance, on the ground that the defendants are concluded by the judgment roll in evidence.

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The ruling of the referee should be sustained for the following reasons, viz :

First. The defendant, Emilie M. Salmon, was not a party to the former action.

Second. The question of solvency, and the questions for the solution of which this evidence was presented, did not arise in the former action, are new matter, and are not *res adjudicata*. (*Maybee* agt. *Avery*, 18 *Johns.* 353; *Vail* agt. *Vail*, 7 *Barb.* 242; *Le Guen* agt. *Gouveneur*, 1 *Johns. C.* 492.)

(a) The broadest construction of the rule of *res adjudicata*, and the one most favorable to the plaintiff, will not render his exception good. The former action must have been between the same parties, or the party desired to be concluded must have had a right to appear, and the judgment must have been upon the same question now desired to be raised (1 *Green. Ev.* § 523).

VI. The judgment below was correct, and should be affirmed.

By the court, LEONARD, J. The plaintiff is a judgment creditor of Hamilton H. Salmon, and seeks in this action to reach real estate conveyed to Mrs. Salmon for the consideration of \$6,900, of which the sum \$2,400 was paid by her husband, the judgment debtor, and the balance, \$4,500, secured by her mortgage upon the premises conveyed to her. At the time of the payment of the money, the debtor was ignorant that he owed anything to the plaintiff. So far as it appears from the case he owed but one other debt, and although the amount of that was pretty large, the creditors held full security for the amount. It also appears that the debtor sustained very large losses shortly after the payment of the consideration for the conveyance to his wife, Mrs. Salmon. Upon this evidence the referee has found that the debtor paid the money for the conveyance without any fraudulent intent.

It appears to me that the evidence sustains this finding. The presumption of fraud, which attaches by reason of the payment of the consideration by Mr. Salmon for the conveyance of the premises to his wife, has been overcome. There

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is no reason for disturbing the finding of the referee. The referee admitted evidence tending to show that the debt to the plaintiff was contracted by Mears, a partner of Mr. Salmon, and that the plaintiff made no claim against Mr. Salmon personally, till after the conveyance to his wife, and that Mr. Salmon was not informed of the existence of the claim at the time he paid the money for the conveyance. The plaintiff's counsel took an exception to the admission of this evidence. It appears to me to have been admissible to show the want of a fraudulent intent on the part of the defendants.

The judgment should be affirmed, with costs.

SUPREME COURT.

SPENCER J. REED agt. WILLIAM E. MOORE.

On an *appeal* from a judgment in a justice's court, under section 371 of the Code, the respondent must be responsible for the *offer* he makes to allow the judgment of the justice to be corrected, without regard to the extent the appellant claims in his *notice of appeal* it should have been more favorable to him.

The respondent's right to *costs* in the county court must depend upon the fact, if his offer be not accepted, whether the judgment of that court be more favorable to the appellant than such offer; and if more favorable to the appellant than the respondent's offer, the section is imperative that the appellant will be entitled to costs; otherwise, he will be liable to the respondent for costs.

Consequently, the respondent is not confined in his offer to the claim of the appellant in the notice of appeal, even if that claim is *particular and specific as to the amount*; and this being so, it would be useless, and should, therefore, not be held necessary that the appellant's claim should be specific in amount.

The correct doctrine on this point is held in *Fox agt Nellis* (25 How. 144), and *Loomis agt. Higbie* (29 How. 232), that it is not incumbent upon the appellant to point out in his notice of appeal, any specific error through which the judgment has been made too large or too small, nor to fix any amount to which it should be reduced; but that the general statement that "it is for too large a sum," or that "it should have been for a less amount of damages," is a sufficient particular to put the respondent to his offer. (*See also to the same effect Wynkoop agt. Halbut*, 43 Barb. 266.) (MASON, J. dissenting.)

The legislature undoubtedly intended, in the language of the court in *Fox agt. Nellis*, to allow "each party to become an actor for the correction of errors, at his own peril of future expense, in case of further controversy."

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Broome General Term. Argued November, 1865. Decided July, 1866.

Present, PARKER, MASON and BALCOM, Justices.

THE plaintiff recovered a judgment against the defendant before a justice of the peace for eighty-nine dollars damages, on the 8th day of February, 1865. The defendant appealed from the judgment to the Broome county court, and asked for a new trial in his notice of appeal, "upon the following grounds, viz: 1. That the justice erred in refusing to nonsuit the plaintiff. 2. That the judgment was rendered against the law of the case. 3. That the judgment was rendered against the evidence. 4. That the judgment should have been for the defendant and not for the plaintiff. 5. That the facts proven on the trial are not sufficient to constitute a cause of action against the defendant. 6. That the judgment of the justice should have been made more favorable to the defendant in these particulars, viz: 1. That the justice allowed the plaintiff for 103 days for keeping defendant's horse, at \$1.00 per day, and deducting therefrom 14 days' absence of horse, making the sum of \$89, when in truth and in fact he should have allowed the plaintiff only \$75, being the amount claimed in the complaint for keeping said horse for 15 weeks, at \$5 per week, making a difference in the damages of \$14; which sum of \$14 this defendant claims should be deducted from the amount of said judgment, and the judgment made more favorable thereby to the defendant. 2. That the justice rendered judgment for the plaintiff for \$89, when in truth and in fact he should have allowed only \$78.70, making a difference of \$10.30, which sum of \$10.30 the defendant claims should be deducted from said judgment and made more favorable to defendant."

The respondent served a notice upon the plaintiff, and the justice consenting that the damages in said judgment might be reduced from \$89 to \$75, and that said judgment might be changed or altered accordingly

The appellant did not accept said offer.

The action was tried in the county court in June, 1865,

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when the jury rendered a verdict in favor of the plaintiff for seventy dollars (\$70).

The respondent caused his costs in the county court to be taxed, and at his request the county clerk entered a judgment on the verdict in the county court for the amount thereof (\$70), with \$43.48 costs, on the 12th day of June, 1865. The appellant's attorney on the same day served notice of the adjustment of the appellant's costs for the 14th day of the same month, on which day they were adjusted by the county clerk at \$56.32.

The appellant then made a motion in the county court to set aside the judgment for costs entered in favor of the respondent, and for judgment in favor of the appellant for costs, and the county court (on the 4th day of September, 1865,) made an order setting aside the judgment for costs entered in favor of the respondent, and ordered that the appellants costs (\$56.32) be set off against the respondent's damages of \$70, and that the respondent was only entitled to a judgment against the appellant, for the residue of said damages, viz: \$13.68. The order of the county court awarded costs in that court to the appellant, and denied costs in that court to the respondent. The respondent (plaintiff) appealed from the order of the county court, on the question of costs, to this court.

LEWIS SEYMOUR, *for plaintiff.*

GEORGE BARTLETT, *for defendant.*

The following opinions were delivered in this court:

BALCOM, J. The case of *Wynkoop* agt, *Halbut*, (43 Barb. 266), settled the question in this district, that a statement in the notice of appeal from the judgment of a justice of the peace to the county court, that the appellant claims the judgment should have been in his favor and not against him, is insufficient to compel the respondent to serve an offer to allow the judgment to be corrected or be liable for costs in the county court, if the judgment of that court be more

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favorable to the appellant than the judgment of the justice. The case of *Loomis agt. Higbie* (29 *How. Pr. Rep.* 232), settled the question in this district, that a statement in the notice of appeal to the county court, "that the judgment should have been for a less amount of damages against the appellant," is a compliance with section 371 of the Code, so far as it requires the appellant to state in his notice in what particular or particulars he claims the judgment of the justice should have been more favorable to him. In the latter case, the judgment of the county court was \$100 less than the judgment of the justice; but the respondent had not served an offer to allow the judgment of the justice to be reduced to \$50, as he might have done, and he was adjudged liable for costs in the county court. This court also held, in that case, that the respondent may make his offer to allow the judgment of the justice to be corrected in any particular complained of in the notice of appeal, *in his own terms, and to the extent he may deem prudent or just*. The respondent in this case had that right. He could have served an offer to allow the judgment to be reduced to \$70, although the lowest sum the appellant claimed in his notice of appeal, for which it should have been rendered, was \$75. And as the respondent only recovered \$70 in the county court, and he had only offered to allow the judgment of the justice to be reduced to \$75, which offer was not accepted, he must pay costs in the county court; for the reason that the Code is, "if such offer be made and not accepted, and the judgment of the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs." The judgment of the county court in the case, was more favorable to the appellant than the offer of the respondent, which was not accepted. The appellant was, therefore, entitled to costs in the county court. But it is said the respondent is entitled to costs, because he offered to allow the judgment of the justice to be reduced, all the appellant claimed in his notice of appeal, it should have been more favorable to him; and that the claim in the notice that the judgment of the justice should have been in favor of the

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appellant and not for the respondent, does not affect the question. I am of the opinion there are two conclusive reasons against this position. The first is, the respondent could have served an offer to allow the judgment of the justice to be reduced to a less sum than the appellant claimed in his notice of appeal the amount should have been; he could have offered to allow it to be reduced to \$70, or to any less sum. The second is, the language of the Code is imperative, that if the offer of the respondent be not accepted and the judgment of the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs." The alteration,* made by the legislature of 1866, in section 371 of the Code, does not affect the question in this case, for the judgment of the county court was nineteen dollars less than the judgment of the justice, aside from costs. And I will add that I am satisfied, after very carefully considering the question, that the respondent must be responsible for the offer he makes to allow the judgment of the justice to be corrected, without regard to the extent the appellant claims in his notice of appeal, it should have been more favorable to him; and that the respondent's right to costs in the county court must depend upon the fact (if his offer be not accepted), whether the judgment of that court be more favorable to the appellant than such offer, and if more favorable to the appellant than the respondents offer, he will be entitled to costs, otherwise he will be liable to the respondent for costs. I am unable to see how any other construction than the one above mentioned, can be put upon section 371 of the Code, without disregarding the plain language of one paragraph in the section (*See Loomis agt. Higbie, supra*).

For these reasons I am of the opinion the order of the Broome county court, awarding costs to the appellant in that court should be affirmed, with \$10 costs.

PARKER, P. J. This is an appeal from an order of the Broome county court. The action was brought in a justice's court, when the plaintiff recovered a judgment for \$89 damages, and \$3.88 costs. The defendant appealed to the said

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county court, and in his notice of appeal, after stating several grounds of error affecting the entire judgment, he states the following particulars in which the judgment should have been more favorable to him. 1st, that it should have been for only \$75 damages, and that \$14 should be deducted from the judgment. 2d, that it should have been for only \$78.70 damages, and that \$10.30 should be deducted from the judgment. Within fifteen days after the service of the notice of appeal, the plaintiff served an offer to allow the damages in the judgment to be reduced from \$89 to \$75; and the judgment to be corrected accordingly. The defendant did not accept the offer, and the case went to trial in the county court, which resulted in a verdict for the plaintiff for \$70. The plaintiff thereupon made up his costs and entered up judgment for damages and costs, and then gave notice of a readjustment. The clerk refused to allow costs to the plaintiff, but adjusted the defendant's costs at \$56.32. Whereupon the defendant moved the county court to set aside the judgment entered up by the plaintiff, and to set off the defendant's costs so adjusted, against the plaintiff's damages, and allow the plaintiff judgment only for the balance which motion was granted, and this appeal is from the order thereupon made.

The simple question raised on the appeal is, which of these parties, under section 371 of the Code, is entitled to costs.

That section provides, that the appellant, in his notice of appeal, shall state, "in what particular or particulars the judgment should have been more favorable to him." That the respondent may serve an offer "to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal," and that the appellant may file an acceptance of such offer. It then goes on to provide, that "if such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below; or, if such offer be made and not accepted, and the judgment of the appellate court be more favorable to the appellant than the offer of the respondent, the appel-

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lant shall recover costs." In the application of this section of the Code to the different cases coming up under it, questions have arisen, the decision of which has shown considerable conflict of opinion. It has been held that by it, the appellant is required to specify some error in the judgment by which it is made too large or too small, as for example, a mistake of calculation, or an item erroneously allowed or disallowed, or some other error of fact or law, which has led to the excess or deficiency in the judgment complained of. Such is the view of the court in *Gray* agt. *Hannah*, (30 How. 155). Again, it has been held with a somewhat less rigid requirement, that "to conform to this section of the statute, it should be claimed unqualifiedly, by the appellant in his notice of appeal, that the judgment should be reduced to some certain amount, or corrected in some other respects, specified in the notice, as the case may require." To this effect are the decisions in *Forsyth* agt. *Ferguson*, (27 How. 67); *Barnard* agt. *Pierce*, (28 How. 232), and *Wallace* agt. *Patterson*, (29 How. 170). These cases proceed (as they must), upon the idea that the appellant has the advantage and responsibility, of fixing the amount to which the judgment is to be reduced or enlarged, and that the respondent can only adopt such amount in his offer, if he makes one.

On the other hand it was held in *Fox* agt. *Nellis*, (25 How. 144), and in *Loomis* agt. *Higbie*, (29 How. 232), that it is not incumbent upon the appellant to point out, in his notice of appeal, any specific error through which the judgment has been made too large or too small, nor to fix any amount to which it should be reduced; but that the general statement that "it is for too large a sum," or that "it should have been for a less amount of damages," is a sufficient particular to put the respondent to his offer; and this view is concurred in, in *Wynkoop* agt. *Halbut*, (43 Barb. 266). These cases do not give the appellant the advantage of fixing the amount to which the judgment shall be reduced, and shut up the respondent in his offer to such amount.

This is the view which we, in this district, have taken, in the cases of *Loomis* agt. *Higbie*, and *Wynkoop* agt. *Halbut*,

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(*supra*), and I still think such view is the only one which will give the effect, to all the provisions of the section, intended by the legislature.

If the appellant may fix the amount, and the respondent can offer only in accordance with it, the operation of the section will be, as shown in *Loomis agt. Higbie*, to enable the appellant to pursue the litigation through the appellate court at the entire expense of the respondent, for he has only to fix the amount so low, at six cents for example, as to require the respondent virtually to give up his judgment, or risk no offer; or, he can compel him to sustain his judgment for the entire amount, less any trifling sum which the appellant may choose to deduct in the notice of appeal, although the respondent may see that it must be reduced beyond that sum, upon the trial. Manifestly the legislature did not intend this, but did intend, in the language of the court in *Fox agt. Nellis*, to allow "each to become an actor for the correction of errors, at his own peril of future expense, in case of further controversy." In accordance with this, the appellant indicates in his notice of appeal, that he insists on a reduction of the judgment, fixing the sum or not, as he chooses. The respondent looks over his case and makes up his mind whether he can sustain his judgment for its entire amount, and if he thinks not, offers to reduce it to a sum at which he is willing to undertake to sustain it. If the appellant has been specific in his notice, and limited his claim to a particular amount, the respondent is not thereby so limited, but may offer the appellant better terms than he demands, and must do so at the still impending peril of costs; for, though he offers the appellant precisely what, and all that, he has claimed, the appellant is not bound to accept the offer; and if he does not, the respondent must keep his judgment, upon the trial, up to the offer or pay costs. In the language of the section, "if such offer (the only offer provided for), be made and not accepted, and the judgment of the appellate court be more favorable to the appellant *than the offer of the respondent*, the appellant shall recover costs." When we are brought to give effect to this provision, we

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cannot but feel very confident that the legislature did not intend to confine the respondent, in his offer, to the precise claim made by the appellant, else it would not have made him liable for costs, if the offer turned out to be a less favorable one than the appellant, as shown by the result, was entitled to. They must have intended, in view of this liability thus imposed upon him, to give him the opportunity to judge for himself in regard to the amount of his offer, and to determine whether the appellant has required of him too much or too little, more or less, than upon the new trial he can show should be allowed.

From this view of the whole section, I conclude that the respondent is not confined in his offer to the claim of the appellant, even if that is specific as to amount; and this being so, that it would be useless, and should, therefore, not be held necessary that the claim should be specific in amount.

In regard to the question before us, it follows from the conclusion above stated, that inasmuch as the offer of the plaintiff was not accepted, and the judgment was upon the trial made more favorable to the appellant than the offer, the appellant was entitled to recover costs.

The motion was, therefore, correctly decided by the county court, and its order should be affirmed, with costs.

So decided.

UNITED STATES DISTRICT COURT.

MARY A. SMITH agt. JOSEPH A. WILSON.

A Court of Admiralty has jurisdiction, in all cases of wrongs complained of committed on the high seas, or within the ebb and flow of the tide, where an action of case, or trespass on the case might be maintained for such wrongs in a court of common law jurisdiction.

The master of a ship or vessel stands, towards women and minors, in the relation of a parent, especially so when they are unaccompanied by a natural guardian. And in the eye of the law, he stands to all his passengers in loco parentis. They are entitled as matter of right, to his attention and protection.

No man of blunted moral sense, or of low intellectual range, or who does not possess a nice, delicate sense of honor, or whose experience of life is narrow and meagre, should be allowed to occupy the position of master of a ship.

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Where the master of a coast steamer, suffered a notorious gambler—a passenger on his vessel, to decoy a young man of eighteen years of age, also a passenger, into playing upon a “sweat cloth,” by which the latter lost \$750, of money belonging to his widowed mother; *held*, that the master was liable, in admiralty, at the suit of the mother for the whole amount of the money and interest.

Southern District of Alabama. In Admiralty.

Before Hon. RICHARD BUSTEED, U. S. District Judge.

THE libellant is a widow woman, residing in South Carolina, and the respondent is the master of the Manhattan, one of the line of steam vessels plying between Mobile and New Orleans, for the carriage of passengers and freight. On the 23d of February, 1866, the plaintiff's son, a minor, eighteen years of age, took passage on board of this ship at New Orleans, where he had been to receive a thousand dollars of his mother's money, from her agents at that place. He got these funds, and was returning with them to her. In the course of the evening, and while playing a game of euchre, for pastime, with some of his acquaintances, a man came from one of the state rooms, having with him some gambling appliance, known to the fraternity as a “sweat cloth,” and at once invited these young persons to leave their own game and he would “show them something more attractive,” saying that he had been given a considerable sum of money to distribute among those who made good throws with the dice he exhibited. Almost simultaneously with this, another man, who is proved by the testimony to have been a confederate of the owner of the “sweat cloth,” came from the same state room, and going up to young Smith, said: “Let us see him out.” Smith and his challenger then went to the table upon which the “sweat cloth” was spread, and began playing by each putting down a dollar, and both losing. This continued until Smith, greatly excited, increased his stake to twenty dollars on each throw of the dice. The confederate of the gambler, meanwhile, had ceased to play. One of the companions of Smith, seeing how matters were going, tried to induce him to leave off, but the gamblers persuaded him to continue, upon the assurance that he could propably not only recover his losses, but make large gains. Under this stimulus their inexperienced

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victim played deeper and deeper, until seven hundred and fifty dollars of his widowed mother's money was secured by the thieves. The exhibitor of the "sweat cloth" then coolly rolled up the gambling apparatus, and went with it and the stolen money into his state room.

The Manhattan did not arrive at Mobile until after 12 o'clock the next day (the 23th).

There is a conflict of testimony upon the question whether Captain Wilson was present, looking on, while the gamblers were fleecing young Smith. Whatever the truth is on this point, there is no dispute that the clerk of the boat was there the whole time, and witnessed the operation. The clerk, himself, admitted this on the trial, and it was testified to by a witness of unimpeachable veracity. It also appears, by the testimony of both the clerk and the captain, that the clerk informed Captain Wilson of the gambling affair, and the extent of young Smith's losses, immediately upon the occurrence of those events, but that no measures were taken to compel the gamblers to make restitution of their booty. It is further admitted by the captain and the clerk that the chief gambler was known to them both as a gamester, in the habit of traveling on the boat, and that on a former occasion the captain prevented him from pursuing his abominable vocation.

These facts are undisputed, and upon the case as made and the law applicable to it, I am called upon to adjudicate between the parties litigant.

An objection, *in limine*, is made to the jurisdiction of the court. It is contended, by the counsel for the respondent, that the remedy of the plaintiff is by an action in a court of common law jurisdiction, and that this case does not come within the definition of a marine tort, cognizable in admiralty. On the other hand, the counsel for the libellant insists that the jurisdiction of the admiralty courts of the United States is conferred by the constitution, and does not, as was argued, depend upon the regulations of commerce; that where an action on the case may be maintained according to the course of the common law, the admiralty court has also

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jurisdiction, if the cause of action arose upon the high seas, or within the ebb and flow of the tide.

The authorities cited by the libellant's counsel appear to settle the question in favor of the jurisdiction of this court. I have not reached this conclusion without being obliged to overcome preconceived opinions tending to a contrary result. In a doubtful case I am anxious not to find jurisdiction, preferring to think that where it is not plainly granted, or to be fairly implied, it is, for wise reasons, expressly withheld. But upon a careful examination of the cases cited, and the principles upon which admiralty jurisdiction is based, I am of opinion that the libellant and her cause of action are *coram judice*.

The test by which the jurisdiction of this court is ascertained in cases like the present is, the wrong complained of must be committed on the high seas, or within the ebb and flow of the tide, and be of such a description that an action of trespass on the case might be maintained for it in a court of common law jurisdiction. That great lawyer, Sir William Scott, said that an "injury done on the high seas is a fit matter for redress in a court of admiralty;" and Doctor Godolphin, whom Mr. Justice STORY quotes approvingly, and whom he describes (*Chamberlain agt. Chandler*, 3 *Mason's Reports*), as "a very learned admiralty judge," declares that "affairs relating to ship's officers or mariners, their office and duty, their offenses, whether by willfulness, casualty, ignorance, negligence or insufficiency, with their punishments," are proper subjects of admiralty jurisdiction.

If other and modern authority were needed on this point, it may be found in the case of *The Philadelphia, Wilmington and Baltimore Railroad Company agt. The Philadelphia and Havre de Grace Towboat Company*, reported in 23d *Howard's Supreme Court Reports*. Mr. Justice GRIER (pp. 214, 215) says: "The jurisdiction of courts of admiralty in matters of contract depends upon the nature and character of the contract; but in torts, it depends entirely upon locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that

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they come within the jurisdiction of that court. Nor is the definition of the term 'torts,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force. It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case."

Having disposed of the question of jurisdiction, I will now consider the case on its merits. It is a case of much interest and importance. It concerns all that portion of the community who travel by water, and involves a consideration of the character of ship masters, their powers, duties and responsibilities. I know of no more important relationship to society than that of the commander of a vessel engaged in the carriage of passengers. Chancellor KENT (*vol. 3, m., p. 159*) says: "He ought to possess moral and intellectual as well as business qualifications of the first order." *Cleirac*, in his *Jugemens d'Oleron C. I.*, says that "the title of 'master of a ship' implies honor, experience and morals."

Volumes might be written in amplification of these tersely stated premises, without adding to their pith and aptness. They are, in effect, declarations of the maritime law, that no man of blunted moral sense, or of low intellectual range, or who does not possess a nice, delicate sense of honor, or whose experience of life is narrow and meagre, should be allowed to occupy the position of master of a ship. His authority at sea is of the most absolute character—amounting almost to sovereignty. He can exact unquestioning obedience from all on board, and make even his caprices the law of the voyage. Passengers and seamen are alike subject to his control. He may suitably punish a refusal of either to obey the reasonable regulations of the vessel, or for gross behavior while on board. If he is of opinion that the good order or safety of the ship requires it, he may invade the privacy of a state room, and exclude a passenger from the cabin. He "may refuse passage to persons whose characters are doubtful, or dissolute, or suspicious and *a fortiori*, whose characters are unequivocally bad." He has

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the right to inquire into the intent with which a traveler seeks a passage, and "to act upon reasonable presumption in regard to him," as for instance: "If a known or suspected thief were to come on board," he would be authorized to presume his intention to be to carry out his criminal designs against the property of others, and not only may, but might refuse to convey him, or accept all the liabilities of carrying him (*Jencks agt. Coleman, Sumner's Reports, p. 222*). If then, he may refuse passage to persons of known bad character, if he have the right to say to a thief "I will not allow you on board of my ship," and if he should say and do this in regard to a notorious rogue, what should he do when he finds out that a common gambler, with the tools of his avocation for luggage, is among his passengers?

The enlightened judgment of mankind consents to stigmatize gambling as a most pernicious vice. Every Christian code denounces it as a crime, and punishes it as such. A common gambler is a common nuisance. Insensible to honor, deaf to pity, and bent upon plunder, he is a human cormorant, more detestable than the bird of prey itself; and if it is within the power, it is the clear duty of the managers and directors of public conveyances to save the traveling community from contact with them.

The extensive powers with which the master of a vessel is clothed, are not, however, to be used except in furtherance of the objects the laws have in view, and in every case responsibility runs parallel with privilege. The misuse of authority is the parent of accountableness, and it is a proposition of universal application in the affairs of civilized life that whenever the laws invest any person with an enlarged degree of power over his fellows, they impose a corresponding obligation, and watch with a jealous eye the exercise of discretionary authority. Hence it is that the duties of a master of a vessel are stated with great precision and clearness in the books. I need not consider here what his duties are to the owners of a ship or to the officers and crew of his command. None of these are involved in the case under consideration. "In respect to passengers," says Judge

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STORY (*Chamberlain* agt. *Chandler*, 3 *Mason's Reports*), "the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board. It is a stipulation not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evil without reluctance; and that promptitude which administers aid to distress."

Towards women and minors, the master of a ship is bound at all times to exercise the care and tenderness of a *pater familias*, and this is especially his duty when they are unaccompanied by a natural guardian. The fact is that, in the eye of the law, he stands to all his passengers *in loco parentis*. They are entitled as matter of right, to his attention and protection. It is not to be tolerated that a person of immature years, or a female passenger, shall be beaten or robbed in the presence of the captain or one of his officers, and he not be held accountable in damages to the father or husband? And should it make any difference in his legal liability, that though not present at the perpetration of the crime, he takes no means to punish the assaulter, or make the thief disgorge, on being reliably informed of the commission of the offense? Does he not, in effect, consent to the outrage, if he does not use the means within his lawful reach, and promptly, so far as those means extend, to redress the grievance? Judge WARE, in *Plummer* agt. *Webb et al.* (*Ware's R.*), on this point, says: "He (the master) is intrusted by the law with the supreme power on board of his ship, and what is done by his permission must be considered as done by his authority." And in the case before me, if a generous construction of Captain Wilson's omission takes from it any collusive aspect, can justice or law require less than liability for the results of his negligence? Shall he go free, if he make no attempt to discharge a plain duty, the performance of which might, and in all probability would have corrected the evil, while yet the wrong doer was legally subject to his control?

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A decree will be entered that the libellant, Mary A. Smith, recover from the respondent, Joseph A. Wilson, the sum of seven hundred and fifty dollars, with lawful interest thereon from the 22d day of February, 1866, together with costs.

COURT OF APPEALS.

WILLIAM S. ROGERS, and wife, respondents, agt. JOHN W. McLEAN, and others, *in the matter of the petition of* JOSEPH RICHARDSON, appellants.

The *general term* of the supreme court, have the power, *on appeal*, in an action for *petition*, to order the *amendment of the partition* of a committee or guardian of a non-resident infant lunatic defendant, sworn to in another state, and presented here for the purpose of the appointment of a *guardian ad litem* in the action, to the effect that such infant lunatic ward, was at the time of verifying his original petition, residing with the committee, the petitioner, or under his charge or custody.

Also, ordering the amendment of the jurat or certificate of the judge attached thereto, stating the place where such petition was verified, and the affidavit taken; and, also, an amendment of the certificate of the clerk, so that it shall, in addition to its present contents, certify to the existence of the court, and the genuineness of the signature of the judge, which amendments when made, shall be deemed to be made and filed *nunc pro tunc*.

The committee or guardian, residing out of the jurisdiction of the court, properly applied by petition for the appointment of a *guardian ad litem*, residing within its jurisdiction.

June Term, 1866.

THIS action was commenced for the purpose of effecting a partition and sale of a certain house and lot, whereof Samuel S. Engle died seized, situated in the city of New York. At the sale of said premises, pursuant to the judgment of the supreme court, they were struck off to the petitioner, Joseph Richardson, for the sum of eighty thousand two hundred and fifty dollars (\$80,250), he being the highest bidder therefor. The said purchaser objected to the completion of his purchase on various grounds, and declined to complete the same.

Subsequently, he presented his petition to the supreme

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court, praying that he might be discharged from such purchase money, and that the ten per cent paid at the time of the sale by him, might be returned to him with interest, and that the costs and expenses to which he had been subjected by reason of said purchase, might be refunded to him. Said application coming on to be heard at a special term of the supreme court, held in the city of New York on the 12th day of March, 1860, the prayer of the petitioner was granted, and the petitioner was discharged from his purchase.

On appeal to the general term the order was reversed, and it was ordered that the petitioner be required to complete his purchase, provided that the plaintiff, within forty days after the entry and notice of that order, should procure and file with the clerk of the court an amendment to the petition of William J. Mount to the effect that Samuel Mitchell, his infant or lunatic ward, was at the time of verifying his original petition, residing with him or under his charge or custody, and an amendment of the jurat or certificate of the judge attached thereto, stating the place where said petition was verified, and the affidavit taken, and an amendment of the certificate of the clerk, so that it shall, in addition to its present contents, certify to the existence of the court and the genuineness of the signature of the judge, which amendments, when made, shall be deemed to be made and filed *nunc pro tunc*. If not so made and filed, as aforesaid, then the order of the special term was to be affirmed, except in some unimportant particulars as to costs. The petitioner has appealed from this order.

GEO. T. STRONG, *for appellants*.

BENJ. L. BILLINGS, *for respondent*.

DAVIES, Ch. J. In consideration of this appeal, we are to assume that these amendments have been made, as directed by the order of the general term, and to regard the proceedings in determining their legal effect as amended accordingly.

The main objection to the title, as urged in the supreme

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court and insisted on here, is that Samuel Mitchell, who was seized of one undivided twentieth part of said premises, had not been made a party properly to said partition suit; and that, therefore, the purchaser at said sale, had not acquired his interest therein. The notice of the pendency of the action was filed on the 11th day of November, 1854. It appeared from the proceedings in the action, that on the 4th day of January, 1855, there was presented to the supreme court, at a special term thereof, a petition of William J. Mount, entitled in said suit, setting forth that the petitioner was guardian of Samuel Mitchell, an infant idiot, about twenty years of age. That an action had been commenced in the supreme court of this state for a partition of the premises in question. But that as the petitioner's said ward was an infant lunatic, as above set forth, the petitioner prayed that S. B. H. Judah, of the city of New York, counsellor at law, might be the guardian of the petitioner's ward in the defense of said suit, according to the statute in such case made and provided.

This petition was dated December 1, 1854, and sworn to in Ohio, before the judge of the probate court of Warren county, in said state, on the 19th day of December, 1854, by the said Mount, and to which was annexed a consent signed by said Judah, consenting to become the guardian *ad litem* of the said Mitchell in that suit. At a special term of the supreme court, held on the 4th day of January, 1855, an order was made and duly entered, reciting that on reading and filing the petition of Samuel Mitchell, idiot, showing that said defendant was an infant, and thereby appointing said Judah guardian *ad litem* of said infant defendant on giving the security as therein provided.

Mr. Judah put in an answer for Samuel Mitchell, an infant idiot, submitting his rights and interests to the protection of the court, which was duly verified on the 6th day of January, 1855, and was filed March 12, 1860, as of the 7th of April, 1859. The cause was brought to a hearing on the 7th of October, 1859, and the usual judgment of partition and sale entered.

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And in said judgment it was ordered that the referee charged with the sale of said premises should pay unto the chamberlain of the city of New York, the part or share which of right belongs to the said Samuel Mitchell, who it was therein declared is an idiot, being the one-twentieth part of the net proceeds of said house and lot, there to abide the further order of said court.

The court have, undoubtedly, the power to make the amendments ordered at the general term, and as already observed in the discussion upon this appeal, the proceedings are to be deemed amended in accordance with the order.

The power of the court in a partition suit, to order the proceedings to be amended, was fully considered by this court, in *Groghan agt. Livingston* (17 N. Y. 218). That was an appeal from an order made in the supreme court, in an action for partition, compelling the appellants, who had jointly purchased a part of the property at the sale, to complete their purchase. One of the defendants in the action being an infant more than fourteen years of age, Schuyler Livingston, her father, was upon her petition appointed her guardian *ad litem*, by an order entered October 2, 1856. He appeared and put in the usual general answer of an infant. A judgment was entered directing the sale of the real estate described in the complaint. The appellants became the purchasers, and refused to complete their purchase. Their objection to the title was, that Schuyler Livingston had never filed any bond as guardian.

After the appellants refused to complete their purchase, Mr. Livingston executed a bond, which was duly approved as to its form and sufficiency of sureties. Upon filing an affidavit, proving that the omission to execute the bond in due season, was unintentional, and resulted from the neglect of the clerk of the attorney, an order was made by the court at special term, directing the bond to be filed *nunc pro tunc*, as of the 2d of October, 1856, the date of the order appointing the guardian, and to have the same effect as if it had been filed on that day. The plaintiff, upon these facts, applied for an order requiring the purchasers to complete

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their purchase, and such an order was made at special term.

On appeal to the general term the order was affirmed, with some modifications not needful to mention (25 *Barb.* 336).

On appeal to this court the order of the general term was affirmed. As the principal points relied upon by the counsel for the appellant, in this appeal, for his discharge from his purchase, were considered and disposed of at that time, it can hardly be necessary to rediscuss or reconsider them.

It was held and decided that the court of chancery had original jurisdiction of an action for partition, without the aid of the statute. That the plaintiff was not bound in his bill to notice the fact that the defendants, some or all of them, were infants, but he might frame his bill and issue his subpoena as if they were all adults.

After they were brought in upon process, it was necessary, both at law and in equity, that guardians should be appointed for infant defendants, but that no case could be found holding that a judgment or decree, when they appeared by attorney, would be void.

It is to be recollected that in this case the infant defendant Mitchell, appeared by his attorney, who was also duly appointed his guardian *ad litem*, and regarding him only as an infant, it is difficult to see what irregularity there was in such appearance, even if no guardian had been appointed, the want of such appointment did not deprive the court of jurisdiction even at common law.

That in equity the infant became the ward of the court upon the service of the process upon him, and the guardian *ad litem*, was but the agent of the court to attend to its interests during the litigation; and it was said, "if the failure to appoint a guardian at all did not render the proceedings void, for a much stronger reason the failure of the guardian when appointed, to comply with all the requirements of the statute, would not deprive the court of jurisdiction, and render the proceedings void."

Secondly. It was held that the statute did not change this rule in regard to actions for partition, and that the utmost

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that could be claimed on the assumption that no guardian *ad litem* had been appointed, was that the proceedings were irregular merely, and not void.

Thirdly. It was assumed there that the proceedings were not void, and that no good reason existed why the court had not the power to order them amended.

Aside from the Code, the power of the court of chancery was adequate to order such an amendment. It was said that even if the infant had not been made a party at all, and the defect had been discovered immediately after the sale, there was no reason why the court might not have directed her to be brought in by supplemental complaint, and after the appointment of a guardian ; if it appeared best for the infant, the court, by the consent of the guardian, might have made an order directing the judgment to stand good as against her, and allowing her to receive the benefits of the sale.

This in substance has been done in the present action, and the proceeds of the share of the infant's interest in the premises sold, have been brought into court, and now remain there subject to its order for the benefit of the infant.

The circumstance that one of the parties interested in this estate was an infant, lunatic or idiot, could not deprive the other parties interested therein of their rights to a partition and sale of the real estate so held in common by them, nor the court of its jurisdiction.

Before the share or interest of the infant lunatic or idiot, could be disposed of, and his title there vested in a purchaser, he must in some proper form have been brought before the court, and his rights passed upon and protected. It is seen that this has been done, and if there was any irregularity in the manner of doing it originally, that irregularity has been cured by the subsequent amendment which the court have clearly the power to make, under the authority of *Groghan* agt. *Livingston* (*supra*).

If Mitchell had been therefore solely an infant, it cannot be insisted, in the face of this decision, that the proceedings as to him, have not been regular, and that the purchaser by

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this sale has not acquired all his right, title, and interest of, in, and to the property in question.

But if he was an idiot, or lunatic then, he was a non-resident idiot or lunatic, and the proper course was pursued in appointing a guardian *ad litem*, to appear for him upon the petition of his guardian or committee residing in the state of Ohio.

By his petition amended it appears, that at the time of the commencement of this action, Mitchell was an infant of about twenty years of age. Properly, therefore, the guardian *ad litem*, should have been appointed upon his petition: but the additional fact appears that he was an idiot or lunatic. He could perform no act, therefore, in reference to his appearance in the action. It would have been absurd for him to have presented his own petition to the court for the appointment of a guardian *ad litem*.

It further appears from the petition that William J. Mount, residing in the state of Ohio, was the guardian of said Mitchell, and at the commencement of this action said Mitchell was in the care, charge, custody and control of said Mount, and said Mount, therefore, prayed that Mr. Judah might be appointed guardian *ad litem*, to protect the rights and interests of said infant idiot or lunatic in this action.

He was accordingly appointed, and if the court had the power, on the application of Mount, to appoint such guardian, there is an end to any further doubts as to the right of Mitchell, in the property in question, having passed to the appellant by the proceedings in partition and sale in this action.

1. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him (§ 39 of the Code). It was not essential, therefore, that a summons should have been personally, or by publication, served upon either the idiotic or lunatic, or upon his guardian or committee, or persons having him in charge. If an idiot or lunatic is made a party defendant to an action, he must appear and defend by the committee of his estate, if one has been appointed (1 Barb. Ch. P. p. 86), and in cases where there is a committee, he

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generally applied by motion or petition, to be appointed guardian to answer and defend the suit, which is ordered of course (*Id*).

The committee or guardian in this instance, residing out of the jurisdiction of the court, properly applied by petition for the appointment of a guardian *ad litem*, residing within its jurisdiction, and an officer of the court.

The accustomed and well settled practice was pursued in the appointment of the guardian *ad litem* in the present case, and the proceedings in the partition suit have, in my judgment, been entirely regular, and there is no allegation or ground to infer that the interests of the defendant, Mitchell, whether we regard him as an infant or idiot, or all combined, have not been fully protected and carefully guarded. I am for affirming the order appealed from, with costs, to be paid by appellant.

SUPREME COURT.

EDMUND J. GENET agt. GERARD R. BEEKMAN, and others.

It is only in cases where a *clear surplus* will exist, after a reasonable sum has been appropriated to the support of the person for whose benefit a trust has been created, that courts of equity are authorized to interfere in behalf of judgment creditors, and divert a portion of the income or annuity so dedicated, to the payment of the debts of such person.

New York General Term, March, 1866.

Before INGRAHAM, P. J., LEONARD and BARNARD, Justices.

APPEAL by plaintiff, from a judgment entered at special term for defendant, on a report of a referee.

GEO. C. GENET, *for appellant.*

A. THOMPSON, *for respondents.*

By the court, LEONARD. J. It is sought by this action to reach some portion of the income of a trust estate in behalf of a judgment creditor; the trust having been created under the will of a father for the support of his son, the defendant in the judgment.

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The referee has found the net income of the trust to be about \$1,100, and that the sum of \$1,200 is a reasonable sum for the support of the debtor, having just regard to his situation in life, and to maintaining the condition in which he was left by his father.

The referee was authorized to take those circumstances into consideration in arriving at his conclusion. (*Sillick* agt. *Mason*, 2 Barb. Ch. R. 79; *Clute* agt. *Bool*, 8 Paige 86-7.)

The plaintiff complains that the debtor keeps house, and supports an old female servant of his father.

I am unable to perceive that this circumstance affords sufficient ground for diverting any part of the income in favor of a creditor.

It may have been within the very intent of the father that his son should keep house and maintain the servant. While the law sanctions trusts of the nature and objects of the one under consideration, it would be unwarrantable for courts to hold too severe and strict a rule upon the expenditures of the *cestui que trust*. It is true that no person is to be encouraged by courts in incurring debts, indulging expensive habits, and setting just creditors at defiance. At the same time, it is well for creditors not to give credit to persons who have no estate of their own, and engaged in no pursuit of industry whereby any means is to be earned. The debt of the plaintiff was incurred before the trust in favor of the debtor was created, and the existence of that debt, with others, probably induced its provisions.

It is only in cases where a clear surplus will exist, after a reasonable sum has been appropriated to the support of the person for whose benefit the trust was created, that courts of equity are authorized to interfere in behalf of judgment creditors, and divert a portion of the income or annuity, so dedicated to the payment of the debts of such person. No such case is now presented.

The judgment should be affirmed, with costs.

City of Utica agt. Churchill.

UNITED STATES SUPREME COURT.

THE CITY OF UTICA agt. G. CLARENCE CHURCHILL and others.

The judgment of the court of appeals in this case (*reported* 33 N. Y. R. 161), declaring that the shares of stockholders in the National Banks, organized under the act of congress of June 3d, 1864, are liable to unconditional state taxation, is *reversed* by the unanimous opinion of the supreme court of the United States, on the ground that the statute of the state of New York, passed March 9, 1865, authorizes a tax upon the stockholders in National Banks, *at a greater rate than upon shares in state banks.* (*This decision makes good law of the special term case of The People ex rel. Lincoln agt. The Assessors of the Town of Barton, 29 How. Pr. R. 371, PARKER, J.*)

The United States court also *held*, that it was competent for the state to tax shares in National Banks, although the capital stock was invested in government securities.

Chief Justice CHASE, and Justices WAYNE and SWAYNE, *dissenting.*

In the matter of James De Vaucene.

SUPREME COURT.

*In the matter of JAMES DE VAUCENE.**In the matter of JOHN H. KETCHUM.*

Excise Law. The "act to regulate the sale of intoxicating liquors within the metropolitan police district, of the state of New York," passed April 14, 1866, is *not unconstitutional*, as being in violation of section 16 article 3, of the constitution of this state, which provides that no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.

If it be conceded that the act is a *local* one, it is nevertheless valid, for it does not embrace more than *one subject*—the regulation of the use of ardent and spirituous liquors, wines, ale or beer, mentioned therein.

It is settled law, that it is competent for the legislature to regulate the sale and disposition of liquors. Such is the effect of the provisions of this act. Therefore the third section of the act is not unconstitutional, as tending to divest the owner of his property without due compensation.

It is well settled, that a law *invalid in some of its provisions*, may nevertheless, be valid, and enforced as to the residue.

Where the question raised under this act is, whether the sale by a person of ardent and spirituous liquors mentioned therein, without a license granted by the board of excise, subjects him to arrest and imprisonment, upon the complaint made against him? the court must decide that such sale is in express terms prohibited by the act, and is declared to be an offence punishable by fine or imprisonment or both. The act constitutes this a distinct and separate offence, having no connection with any other.

Kings General Term, July, 1866.

Before LOTT, SCRUGHAM and GILBERT, Justices.

WRITS OF HABEAS COPPUS, in each of these cases. In the first case, *In the matter of De Vaucene*, the writ was issued by Judge LOTT; and in the other case, *matter of Ketchum*, the writ was issued by Judge GILBERT, to discharge the defendants from arrest for selling spirituous liquors without licenses, in violation of the excise law of April 14, 1866. As these cases may be considered the pioneer cases, which involve the constitutional construction of this act, the points and arguments of counsel are given very fully.

HENRY W. MOORE, *for defendants.*

These matters came up on two distinct writs of habeas corpus, one of which was issued by Judge LOTT, and the

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other by Justice GILBERT, the former in the case of *De Vaucene*, and the latter in the case of *Ketchum*. The law and the proceedings which have been taken under it, the arrests, and the suits which had grown out of it, were matters that caused a great deal of public comment, and to some extent of public excitement. It had been deemed advisable by some persons engaged in the liquor traffic in this city, that there should be a decision upon the questions involved in this law by some justice, or by some court, whose decisions would have the weight of authority, something by which those who were engaged in the business itself, as well as those public officers whose duty it was to enforce the law, might be governed and guided. And it was with a view of getting that decision that his clients had retained him to argue this matter in their behalf. Their honors well knew from the accounts that had been published within the last few days that the law had been discussed at length and with great ability before several judges in New York city, by very distinguished counsel, especially in one case, which seemed to him to cover every point in which the argument against the law had been made, by Mr. Brady. So much had been said by these gentlemen, their arguments had been so full and exhaustive upon the matter, that much that was new could not now be advanced. He would, however, take the liberty of stating a few ideas that had suggested themselves to him on the subject, but he would say beforehand, that the points he intended were those which were made by Mr. Brady in the case before Recorder HACKETT. He (Mr. Brady) had argued the case upon demurrers to indictments, embracing every offence under that law. The points of Mr. Brady were so elaborate and complete that he would submit them as soon as he concluded, on behalf of the relators in this case.

The first objection to the law, and it had been confirmed by Recorder HACKETT, was that the act is invalid for want of a proper title not being in accordance with section 16 of article 3d of the constitution, which provides that no local bill shall embrace more than one subject, and that it shall

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be expressed in the title. This bill embraced a variety of subjects—it not only pretended to regulate the sale of intoxicating drinks, but it established offences and punished them by fines, and regulated the appropriation of the revenue obtained under the act. Their honors would thus see that the mere regulation of the traffic, was not the only subject provided for in the bill. And he contended it was a local bill within the meaning of the constitution. The title of the act was “an act to regulate the sale of intoxicating liquors within the metropolitan police district of the state of New York.” This was incorrect, because the whole of the metropolitan police district was not included in the bill, the county of Westchester being excluded.

One principal objection was taken on the ground that liquors are property in whose soever hands they might be; that they are so recognized by the law of the state and by the decisions of the courts, and especially by the decisions in the main law cases, where an express resolution was passed by the court of appeals to that effect. He took it there could be no doubt upon the decision in that case, and all the decisions that had ever been made on the subject, that these liquors were property in every sense of the term. And if it were conceded, for the sake of argument, that the legislature might regulate the traffic in them, still he contended it had no right, under pretence of regulating, to prohibit it, or to destroy or in any way impair the rights of persons owning that property in the property itself; and he would endeavor to show that this act impaired and destroyed the rights of property in liquors held by persons prior to the passage of the act. In the first place it prohibited their sale (§ 3) in quantities less than five gallons. It was to him difficult to see what power the legislature had to prohibit the sale in quantities less than five gallons, or what more power they had to prohibit their sale in these quantities than to prohibit it entirely. Quantities less than five gallons were just as much property as quantities over five gallons. It seemed to him that the same rule must be applied to this kind of property as to every other, and that it would be

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utterly unconstitutional and irregular in every respect to provide that no man should sell flour in less quantity than ten pounds at a time, or real estate in less amounts than an acre at a time. When they attempted to regulate in this manner, they destroyed that right of disposition of property without which it is nearly worthless. These restrictions upon trade had always been looked on unfavorably by the courts, and there was nothing which should create an exception in favor of this law.

The law says not only that a man shall not sell, but that he shall not publicly keep liquors in less than five gallons. It makes the mere exhibition of a man's property a misdemeanor. When a man owned property he supposed that he had a right to keep it publicly so long as he did not do so for any unlawful purpose. But the act specified that he should not keep it publicly at all unless he had this license. There was another phrase, that he should not give away or dispose of any strong or spirituous liquors, wines, ale or beer, so that a man who, at the time this law went into effect, might have had a stock of liquors, unless he could find some one to buy it in quantities less than five gallons, was compelled by this law to destroy them, since he could not keep them, nor give them away nor dispose of them, the only thing left was to destroy them. He believed there was no authority for the legislature, under the constitution, to compel a man to destroy property and absolutely put it out of existence, as this law provides, unless he gets a license. He had said enough to their honors to indicate what views he intended to urge. Under pretence of regulating, the legislature had gone further and absolutely destroyed property. According to the provisions of this section, which is the main one of the act, and without which the act would be of no effect, a man was compelled to destroy property which he might have had in his possession before the law went into operation.

He contended also that the law was invalid for this reason if for no other, that it created what might be called geographical crimes, distinctions in the matter of offences

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between different portions of the state, and he intended to urge it upon their honors, that in passing criminal laws it was not in the power of the legislature to make a discrimination between the cities of various and different sections of the state.

As Recorder HACKETT put it, he desired to know whether the legislature could make it grand larceny in New York to steal twenty-six dollars, and only petty larceny in Buffalo to do the same act.

He said further, that this law imposed a tax upon persons engaged in a certain business for the purpose of adding to the revenues of a particular portion of the state, and moreover, that a portion of the money so raised was not to be applied in the district whence it was obtained, the metropolitan police district, but was to go to the asylum at Binghamton. Taxes for the support of public institutions must be raised upon the whole state.

The act was void, too, because it conferred upon the excise commissioners judicial powers. It conferred upon them the power of confiscating licenses which have to be bought at such prices as they themselves may choose to impose. A power was given to cancel licenses and take away all the benefits which might be derived under them. In other words a provision was made by which this excise board was constituted a stated tribunal before whom complaints were to be made and trials held for revoking licenses. He said there was no power in the legislature to erect such a tribunal. It was in reality taking away property without due process of law, in a manner unknown to the constitution, and repugnant to the spirit of our laws.

He also contended that section 19 of the act was void, because it conferred upon policemen, sheriffs, and constables the right, not only to arrest for any violation of this law, but to determine whether the law had been violated, and in case they concluded it had, to confiscate property to a certain extent by summarily closing the place of business of the person who violated the law, for an indefinite period—any length of time they chose—making the policeman the judge

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of the necessity of closing the place before any investigation has been held. It seemed to him that no such provision as that could ever stand—that these officers should have the power of going into a man's house and actually destroying his business upon their own mere motion—upon view—without any judicial proceeding having been taken. It puts the property, or the means of disposing of it, at the mercy of every sheriff, constable and policeman in the police district. He did not know how his learned friend would undertake to sustain that provision of the law, but it seemed to him one which could not be sustained.

There was another section directing that persons having licenses should prevent, as far as in their power, all disturbances and breaches of the peace, and in case any occurred, should give notice at the nearest station house and have their place cleared of all who might be within it, closed, and kept closed till peace was restored. A man might conduct his business in an orderly and proper manner, but a gang of rowdies might raise a disturbance, and because of their act a policeman has the right to close the place and keep it closed.

He would not occupy their time further, except to say that when their honors came to look at the law and examine it, they would discover that under pretence of regulating the traffic in liquors, this was an attempt actually to prohibit and destroy it, and that it does actually work a confiscation and destruction of all property of that kind on hand at the time of the passage of the act. He closed by submitting the points of Mr. Brady.

Judge LOTT asked him if he considered the provisions he referred to made other provisions of the act, such as the one restricting the sale of liquors without an excise license, unconstitutional? Might it not be constitutional in some of its provisions while unconstitutional in others?

Mr. Moore replied that he considered the provisions referred to, as the life and soul of the act, and if they were destroyed the act would be destroyed also.

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JAMES T. BRADY, *on same side.* (*His points used in the cases before Judges CARDOZO and HACKETT.*)

First. This act is invalid, for want of a proper title, as required by section 16, article 3, of the constitution of this state, which provides that "no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." This act embraces several subjects. It not only professes to regulate the sale of intoxicating liquors, but also creates new criminal offenses, and provides for their punishment. For example, section 21 makes intoxication a criminal offense. There are many sections regulating the exercise of criminal jurisdiction, such as the 18th, the 20th and 24th sections. And the title of the act is entirely incorrect, because it is not a law, in any sense, relating to the metropolitan police district, but, as already stated, to certain counties which that district embraces.

Second. The constitution of this state (*article 1, § 1*) provides that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." This plainly includes the rights of property, which necessarily includes the power of disposition. As the late George Wood, Esq., remarked, in an able opinion on the prohibitory liquor law of this state, passed in 1855, "this kind of property (liquor) is manufactured and imported, bought and sold to be used as a beverage, and when not allowed to be used in that way, it is rendered in a great measure worthless as an article of merchandise and traffic. Under these circumstances, it is questionable whether a dealer in the article could afford to pay storage for keeping it. The power of disposal is an essential ingredient of the idea of property. Property imports dominion, use, control. In a civil country, indeed in any country advanced beyond the hunter state, the power of disposal is all important. No man would acquire this property in the way of business, as

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an article of exchange for the ordinary uses to which it is applied, unless he could sell it."

In the language of the late Mr. Justice CATRON, of the supreme court of the United States, "ardent spirits have been for ages and now are subjects of sale and lawful commerce, recognized as such by our treaties with foreign powers, and by the dealings in them among the states of the union." They are recognized in our national legislation as sources of revenue in the way of duties, on such as are imported, and all of them are included in the basis on which the income and other national taxes are assessed (*Wynehamer* agt. *The People*, 13 N. Y. Rep. pp. 378 and 487).

Third. The law of 1866 is unconstitutional, because it makes no distinction whatever between imported liquors and those of domestic manufacture. Section 3 provides in unqualified terms that "from and after the first day of May, 1866, no person or persons shall, within the said metropolitan police district, exclusive of the county of Westchester, publicly keep on sale, give away or dispose of any strong or spirituous liquors, wines, ale or beer, in quantities less than five gallons at a time, unless he or they may be licensed pursuant to the provisions of this act, and may be permitted by it."

The states have no power to prevent or impede the importation of property from foreign countries, for the treaty making power is vested in the President and senate of the United States, and congress is expressly authorized to regulate commerce with foreign nations (*Constitution U. S. art. 1, § 8, sub. 3*). This power is exclusive of all state control. Congress has, in the passage of many laws, provided for the introduction of liquors and other property on the payment of certain duties to the United States. The right to import is, therefore, conferred by law paramount to all state authority, and it gives the importer the right to sell (*Brown* agt. *The State of Maryland*, 12 *Wheaton*, p. 419).

The act in question also extends to liquors brought from other states in the union. Congress has power to regulate commerce among the several states (*Constitution U. S. art.*

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1, § 8, *sub.* 3). No state law can prohibit the introduction of liquors from another state, unless it obtain the power, from the mere fact that congress has not legislated over this subject, which we contend does not create any such right. As section 3 of the act makes no distinction whatever, but is general and arbitrary in its terms, it must be entirely approved or made entirely nugatory. No interpretation can help it, and we insist for reasons just stated that the third section is void. If it be void, the rest of the law has no foundation or basis upon which its detailed provisions can take effect. (*The People agt. Brooks*, 4 *Denio*, p. 469 ; *The People agt. Huntington*, 4 *N. Y. Leg. Obs.* p. 187.)

Fourth. This act is unconstitutional, because as to all persons not licensed, the property, which they held at the date of its passage, or thereafter acquired, is destroyed without judicial process, and merely by legislative will. In effect, therefore, if the promotion of morality be a public use, it is taken for that public use without compensation, in direct conflict with article 1, section 6 of the constitution of this state, which provides, amongst other things, that no person shall be "deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation" (*See R. S. Edmond's edition*, p. 38, and the cases there cited).

Fifth. There is no constitutional warrant for the prohibition against giving away one's property, whether it be liquor or land, or a chattel of any kind. It might be that a person who was refused a license but who owned a large stock of liquors would desire to make them a present to one who had received a license ; this act would prevent his doing so, and yet the liquors would be his property in every sense of the word, with the power of disposition as a natural right left in him, its exercise only prevented by an act of legislation. The result would be, that he must either keep the liquors, or consume them (which he might have no taste to do), or destroy them, being compelled to the latter result, in this event, by legislation.

It may be true that the state can regulate the sale or dis-

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position, for gain or in barter, of intoxicating drinks ; but this power of regulation can never be properly converted into a power of absolute prohibition, nor can the legislature be made the sole judges, when necessity exists to take away a man's property, or impair its enjoyment, or prohibit its use, or make a voluntary gift of it. In the language of Mr. George Wood, "There is, and, in the nature of the case, there must be, a line of demarkation between this legislative power, on the one hand, to impair, and even destroy property for those ulterior objects above alluded to (the preservation of life, health, religion, or morality), and, on the other hand, the power of the judiciary, under the fundamental law, to protect the citizen in his property against hasty or ill-advised legislation, aiming at the destruction of property when that necessity does not exist. By whom is that line to be drawn? The advocates of arbitrary legislative power say it must be done exclusively by the legislature—that they are the sole judges. This would render the fundamental law, as to its action upon the legislature, a dead letter. When they wish to destroy property by sumptuary laws, all they have to do is to aver, by way of enactment, that it is useless or noxious, and the hands of the judiciary are tied. It is said they are sovereign ; but their sovereignty cannot screen them when their acts are brought to the touchstone of the constitution and the supervision of the judiciary, who are its guardians."

Sixth. This act is void because :

1. It does not prohibit the manufacture or importation of any species of intoxicating drinks, and therefore recognizes that the manufacture and importation are to continue. This is equivalent to declaring them legal. With this admission, the attempt to determine what quantity shall be sold at any one time is a violation of the manufacturer's, importer's, or retailer's right of property, he being the sole judge on that subject, the legislature having only the right, at furthest, to regulate the sale to such circumstances as will render the liquor detrimental necessarily, to the public health, peace, or morality. And here will apply the suggestion that a law of regulation must be reasonable : it is quite unreasonable

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to suppose that the sale of liquors in quantities less than five gallons at a time, even by a licensed vender, necessarily tends to any public detriment. It is not the use, but the abuse of liquor that does the injury, either to the individual or the public. The abuse of any article of diet may lead to similar injurious results.

2. If one can lawfully manufacture these drinks in this state, he has the right to export them to other states or countries as a seller ; and yet the general terms of this act would make him criminal for so doing.

It is a great mistake to compare intoxicating drinks with gunpowder, nitro-glycerine, or saltpetre. They are not of themselves capable of serious destruction or injury, nor of being the means of mischief through some slight accidental cause, but are only injurious from the voluntary use of them to excess by human beings, and then acting upon the public chiefly in the way of example. This the law distinctly recognizes, because it provides that no person shall have a license who is not "of good moral character." So it is conceded by the legislature that a man who sells liquor by the glass is only qualified for that pleasing function by having this kind of character.

All property is protected by the constitution, without reference to whether its abuse engenders mischief. (*Wynehamer agt. The People*, 13 N. R. Rep. p. 378.)

Seventh. The act is void because,

1. It undertakes to confer upon the commissioners of excise, in the fourth section, legislative power. No such power can be constitutionally exercised in this state except by the legislature, or somebody chosen by the people ; whereas the commissioners of excise are appointed in and by this act. The fourth section provides for their granting licenses "upon receiving a license-fee to be fixed in their discretion, and which shall not be less than thirty dollars nor more than two hundred and fifty dollars." This amount could only be fixed by the legislature, if any license-fee could be exacted. Assuming that the applicant proves himself to be of "good moral character" no good reason can be

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imagined why a specific sum should not be charged for each license, and the commissioners of excise could not be allowed any discretion on the subject. (*Smith agt. Levinus*, 8 N. Y. Rep. p. 472.)

2. The legislature have no right to require that a man shall be of good moral character in order that he may dispose of property that he owns.

Eighth. This act is also unconstitutional, because, as to quantities of liquors not less than five gallons, it provides that persons not licensed, but who own these liquors, may not sell them at all, if any part thereof shall be "drunk or used in the building, or in any building, yard, garden or inclosure communicating with or in any public street or place contiguous to the building in which the same shall be kept, sold or disposed of." The whole theory and construction of the act being founded on an assumption that the sale of five gallons and upward will not prejudice the public morals, health or peace, there is no authority to declare a sale of that quantity invalid by reason of the fact that some of it, though without the consent of the vender, be used in some place contiguous to, or even forming a part of his premises. This is a restriction upon the use of his property, for which there is no constitutional warrant.

Ninth. The prohibition against the selling or giving away of liquors on Sunday is an unconstitutional restriction on the owner's rights, as appears from what has already been stated—an attempt by legislation to interfere with the religious faith and practices of those who do not believe that Sunday is the true Sabbath. It is giving a preference to one religion over another, in violation of section 3, article 1 of the constitution of this state, which provides that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be allowed in this state to all mankind."

Tenth. The act is also unconstitutional because it invests sheriffs, constables, policemen and other officers with powers not authorized by the constitution of the United States or of the state of New York, but delegated in express violation

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of both. The federal constitution (*articl 4, amendments*) provides thus : " The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue but upon probable cause, snpported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." By section 10 of this article these officers are authorized, on the mere statement of a licensed person that there has been any "disturbance, disorder or breach of the peace" in his place, without any oath or warrant, and though the offense did not occur in the presence of the officer, to cause all persons in the place to be removed therefrom. Section 6 provides that every person who violates any of the provisions of the act preceding that, shall, for each offence, be punished by fine of not less than \$30 or more than \$100, or by imprisonment of not less than ten nor more than thirty days, or by both fine and imprisonment, and to be also subject to a fine of \$50, recoverable in a civil action brought by the commissioners of exoise. Section 19 makes it the duty of "every sheriff, constable, policeman and officer of the police, to compel the observance, and to prevent the violation of the foregoing provisions of the law, if necessary, by summarily closing and keeping closed any places in which shall be violated any of such provisions." Section 20 confers on the officers before designated, authority to arrest all persons who violate any provision of the act, carry them before a magistrate to be dealt with according to that law—the magistrate to entertain any complaint for a violation made by any person under oath. See the opinion of the Hon. Samuel Beardsley, late a justice of the supreme court of this state, in a pamphlet containing various opinions on the prohibitory liquor law of 1855, page 39. Amongst other things he says :

"The act may do credit to the courage of its authors, for they have not hesitated to cast upon the lower grade of officers, judicial and ministerial throughout the state, powers of the most novel, sweeping and dangerous character. The execution of the act, so far as repects the judiciary, is com-

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mitted, in a great degree, to justices of the peace and other subordinate magistrates, whose powers have hitherto been circumscribed within narrow limits cautiously defined. *

* * This is a power which no man should possess, and to the exercise of which no people, fit to be called free, would be likely to submit."

Amongst other offenses authorized to be dealt with in this absolute and arbitrary manner by officers acting either on mere unsworn information, or of their own accord, are :

1. Selling or giving any strong liquors, wines, ale or beer to any apprentice or person under eighteen years of age, knowing or having reason to believe him to be such, without the consent, in the case of an apprentice, of his master or mistress, and in the case of a person under eighteen years of age, of his father, mother or guardian.

2. Selling to a husband or wife any such liquids, against the request of the husband or wife, as the case may be, or the parent or child of such purchaser. In neither of these specified prohibitions is any criminal or wrongful intent specified or implied. It may be that the sale to the apprentice is for his master, or for some other person, at whose request he acts ; but even if for himself, it may not be, injurious, and the section does not require that it must be to create the wrong. And so, the remonstrance of the child five years of age, though against the father perfectly temperate and well behaved, is to deprive him of what he wishes to purchase, unless the seller is willing to subject himself to a criminal prosecution, and the punishment provided for by the sixteenth section.

Eleventh. The act violates the constitution (as the reasons already stated will show), in its prohibition against the sale of any liquors between the hours of twelve at night and sunrise.

Lastly.—In its design, general scope, and effect, and in nearly all its details, this act is an attempt, by arbitrary legislation, to impair not only the right of property in liquors, if not to destroy such right, but also to interfere with the enjoyment in a rational manner by temperate people, who

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are not ascetics or fanatics of beverages, which the experience of mankind shows and this act recognizes, can be used in moderation, not only without injury, but with benefit. This is particularly true of light wines, ale, beer of all kinds, and especially that harmless and excellent liquid called "lager-bier." We do not deny that the legislature might punish intoxication, or the man who induced it with the intent to do so, or who persisted in selling to any one person more liquor than he might plainly perceive he could use without injury, or the carrying on of the liquor business in such a manner as to excite open public immorality, indecency, or breach of the peace. But neither of these consequences arises out of the mere use of liquor, and the error of this, like all oppressive legislation in this state is, that the law does not aim at the specific abuses which produce the public injury, but at the traffic, which may be lawful and innocent. (See opinion of the late Nicholas Hill, jun., p. 108 of pamphlet, where this subject is exhaustibly discussed).

His honor, Judge CARDOZO, has recently rendered a decision, the principle of which applies to these cases, namely, that a license unexpired at the time this act went into effect, was a contract between the state and the licensee, which could not be constitutionally destroyed. The same rule must apply to all liquors held as property by all persons in the state, which were purchased by them as lawful property—the state holding the position of contractor, that having acquired it, they might dispose of it. The power of disposition being taken away, the property may be said to be destroyed. (*See 33 Maine, p. p. 558 and 562, Green agt. Bid-
dle, 8 Peters, p. 1.*)

SAMUEL A. MORRIS, *district attorney, for the People.*

The applicant was arrested for selling strong and spirituous liquors without a license, and taken before the police magistrate in pursuance of the law regulating the sale of intoxicating liquors within the metropolitan police district. While in custody upon this charge, a writ of *habeas corpus*

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was sued out in his behalf, upon the ground that the complaint against him charged no offence against any valid and subsisting law of this state. That this act under which he was held was unconstitutional; null and void.

The only questions presented therefore is the validity of such imprisonment, which involves the validity of the "act to regulate the sale of intoxicating liquors within the metropolitan police district of the state of New York," (passed April 14, 1866), which may be briefly analyzed as follows:

Section 1. Designates the board of excise.

Section 2. Provides for the appointment of an inspector.

Section 3. Prohibits the sale (by retail) of liquor without a license.

Section 4. Authorizes the board to grant licenses.

Section 5. Designates the form, manner of signing and posting the licenses, and declares its non-exhibition presumptive evidence against the person.

Section 6. Points out the requisites of an application for license.

Section 7. Provides for sales in quantities of more than five gallons, under certain restrictions.

Section 8. Prohibits sales on Sundays, election and town meeting days.

Section 9. Compels the board to keep a record of licenses.

Section 10. Authorizes any person licensed to call upon certain officers to assist him in preventing and suppressing breaches of the peace in his place.

Section 11. Prohibits sales to minors and apprentices without the consent of parent or master.

Section 12. Prohibits sales to drunkards and persons intoxicated.

Section 13. Prohibits sales to husband or wife, parent or child, contrary to the request of either against the other.

Section 14. Compels persons to close on Sunday, and from 12 midnight till sunrise.

Section 15. Prohibits persons not licensed from having for sale, or advertising to sell, &c., in quantities less than five gallons.

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Section 16. Declares the penalties.

Section 17. Prevents the collection of debts incurred on sales less than five gallons, if drank on the premises.

Section 18. Declares a conviction for a violation of the law a forfeiture of the license.

Section 19. Authorizes certain officers to compel obedience to the law, and to use the necessary means for that purpose.

Section 20. Authorizes officers to arrest for violation and take the parties before magistrates.

Section 21. Provides for the arrest of intoxicated persons and points out the proceedings thereon.

Section 22. Empowers the board to examine as to violations, and authorizes them to revoke licenses.

Section 23. Designates the uses to which the license money shall be applied.

Section 24. Directs courts to charge grand jury, &c.

Section 25. Makes parties liable in damages to the persons injured by unlawful sales.

Section 26. Repeals inconsistent laws.

I am aware that the foregoing analysis will not pass muster with some of the modern constructionists, who seem to imagine that common sense and legislative intent are absolute, so far as the construction of statutes are concerned. Yet, I submit it fairly presents the substance of this *terrible act, which, if allowed to stand would overturn society, subvert republican government and reduce us to a hopeless state of vassalage*. Indeed, one would almost suppose from reading the arguments that have been made, and the opinions delivered, that some great and overwhelming calamity had befallen the community. Yet, what are the facts; why, since this law went into operation, there have been about one-half as many intoxication cases before our police magistrates on Monday mornings as there were previously. And this calamity is seen in many other ways not less gratifying than the one mentioned.

I venture the prediction that before your honor will arrest such a calamity, you will feel impelled by an inexorable constitutional necessity.

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I make these remarks because this law has been set aside, with all the flippancy that a magistrate would dispose of a case of petit larceny.

The time has been when judges felt the full weight of responsibility resting upon them, when the constitutionality of a legislative enactment was presented for their adjudication. And I am happy to know that the ermine is yet worn by some, who can rise above temporary clamor and noisy threatenings; draw their inspiration from the great jurists who have gone before them; and adjudicate questions of such grave import with becoming dignity.

I am sure your honor appreciates the importance of the question under discussion and will give it your careful consideration. The short time that has elapsed since this case was brought before this court, and the press of official business have precluded the possibility of my making anything more than a partial preparation, and I shall, therefore, leave the burden of the argument to my learned associate, Gen. Crooke.

With these preliminary remarks I will proceed to state the propositions I have thus hastily prepared :

I would remark *in limine*, that the objections urged against the validity of this act, if sound, lead logically to the conclusion, that there never has been a valid excise law passed, notwithstanding courts and judges since the organization of our government have not only recognized their necessity, but have asserted and affirmed their binding force. To deny such legislative power, is to admit that the organic law is fatally defective, because, in that case, it fails in the very object, purpose and design of its creation.

For all the purposes of this argument, the authority must be assumed in the first instance, because the legislative power extends over all the known and recognized subjects of municipal regulation, unless restrained by some positive rule of the fundamental law. Those therefore, who put the legislative authority in controversy take upon themselves the burden of showing the limitation or restriction.

(a) In *ex parte M' Cullum*, Ch. J. SAVAGE says : " Before

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the court will deem it their duty to declare an act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt."

In the case of *Morris* agt. *The People*, LOTT, senator (now an associate of your honor), says: "The presumption is always in favor of the validity of the law, if the contrary is not clearly demonstrated."

(b) "The act is confessedly within the general scope of legislative power, and must be held valid and operative, unless shown to be an act of legislation which is forbidden, either in express terms or by plain and obvious implication, by the organic law of the state."

All laws are presumptively constitutional. The governor, before he approves, is presumed to take the highest opinions on the subject, particularly when the question has been raised in legislative debate, antecedent to the passage of the law, as was the case with this act.

See legislative reports of March, 1866, and refer to practice *passim*.

The following additional illustration of the third point will suffice:

Judge EDMONDS in *Newell* agt. *The People* (7 N. Y. 109), quoting the sentiments of Ch. J. MARSHALL, he said: "I enter upon the examination thoroughly imbued with the principle that the task of determining that a law is void by reason of its repugnancy to the constitution, is at all times one of extreme delicacy; that it ought seldom, if ever, to be done in a doubtful case; that it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers (*Fletcher* agt. *Peck*, 6 Cranch, 128): that it is only in express constitutional provisions limiting legislative power, and controlling the temporary will of a majority by a permanent and paramount law, settled by the deliberate wisdom of the nation, that we can find a safe and solid ground for the authority of the courts of justice to declare void any legislative enactments (*Cochran* agt. *Van Surlay*, 20 Wend. 382); that in constructing the language of a constitution we have nothing to do with arguments *ab*

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inconvenienti, for the purpose of enlarging or contracting its import, the only sound principles being, to declare *ita lex scripta est*, to follow and obey (*People agt. Morrell*, 21 *Wend.* 584) ; that there is no safe rule for construing the extent or limitation of powers in a constitution other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred (*Gibbons agt. Ggelin*, 9 *Wheat.* 188), and that the opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. (6 *Cranch*, 183 ; 1 *Cowen*, 564.)

It is conceded that laws which destroy the essential character of property as such, are repugnant to the fundamental law.

Of this class was the act of 1855, commonly called the Maine law. The law under consideration is in no legal sense prohibitory, but simply regulatory, and the opinions in the *Toynbee* and *Wynhamer* cases have no application whatever to this law.

In those cases, however, the legislative power to pass regulatory liquor laws is distinctly admitted (13 *N. Y. R.* 378).

The act is simply an act of local police regulation, supplemented to the metropolitan police law, and in aid of it, and throughout is in harmony with the principles decided by the United States supreme court in the *Passenger* cases (7 *Howard*).

It is the admitted law, that intoxication, such as occasions or threatens disorder to the community, is a criminal indulgence. The old maxim of the law is, that every man shall so use himself or his property as not to infringe upon the rights of others, or injure those rights. This act has various regulations and provisions, all in harmony with the object sought to be obtained. *First.* It says no man shall sell liquor in small quantities without obtaining permission under the law to do so, to the end that improper persons may not be intrusted with the sale of an article so liable to lead to criminal indulgence, and that those who do sell may thus better restrain this criminal indulgence of others.

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Second. Those who get this permission shall, as matters of police regulation, respect Sunday observance—which is the common law of the land—(*per Judge ALLEN in The People agt. Lindenmuller* 33 Barb. S. C. R. 548). They shall not disturb the people in the enjoyment of reasonable hours of slumber at night, and shall not infringe upon the rights of parents and children, or guardians and wards, or masters and apprentices.

It also contains several other regulatory provisions to which I shall not advert.

This law is not inimical to the constitutional inhibition against local laws containing more than one subject, which shall be expressed in the title.

First. It contains but one subject, the regulation of the sale of intoxicating liquors.

Second. A statute cannot be termed local which provides for the government of a considerable portion of the territory and population of the states, delegating powers of legislation, and authorizing the passage of laws, as well as the administration of them, which, in their operation, affect all the citizens of the state whose persons or property come within the limits of that jurisdiction. (*Phillips agt. Mayor*, 1 Hilton, 483; 1 Selden, 285; 4 Selden, 241; *People agt. McCann*, 16 N. Y. 58. See also opinion in 1 Smith, 532.)

The suggestion that, because the act imposes penalties, and points out the mode of enforcing them, it therefore embraces more than one subject, is clearly fallacious, otherwise it would be necessary to embody the act or its entire substance in the title.

Conceding it to be a local act within the meaning of the constitution, it could not contain a provision for the appointment of commissioners to open a street in the city of Brooklyn, or regulate the Prospect park.

The present law, like all general laws, simply contains details for its enforcement.

It is also contended that the act creates new offenses, and declares criminal, acts not morally wrong, and for these reasons is obnoxious to the organic law. In the first place, it

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creates no new offenses, and in the second place it is perfectly competent for the legislature to penally visit acts not morally wrong, as criminal *per se*.

Penal laws affect from motives of expediency, quite as much as from considerations of morality.

It is not wrong *per se* to row a boat ; yet, to do so within the harbor of New York without a license, is a penal offense. It is not wrong *per se* to carry a stick loaded with lead called "a billy ;" yet, from motives of expediency and public security, the law prohibits such carrying.

It is not morally wrong for a man to support his family by following the occupation of a cartman ; yet he cannot do so without permission.

There are thousands of things that we would have both a natural and moral right to do, but for the restraints imposed by society for self protection and preservation.

There can be no society without restraints and regulations.

Third. The suggestion that the act is unconstitutional and void "because it makes no distinction whatever between imported liquors and those of domestic manufacture," is distinctly met by the case of *Smith and Bunce* agt. *The People* (1 *Par. Cr. R.* 587). In that case Judge STRONG said: "After the repeated decisions of the courts of this state it is too late to contend that the payment of duties upon goods imported from foreign countries operates as an absolute and incontrovertible license to sell them. If it would, it would restrict the state legislature from adopting the most necessary police regulations—a power so essential to their well being, if not to their political continuance, that it cannot be inferred that the framers of our national constitution so abrogate it."

Again, he says, "The state, however, has the right to adopt general regulations in reference to its internal affairs, which shall include imported goods equally with those of domestic origin. Thus they can tax both together. So they can, when in their opinion the public good requires it, impose restrictions upon their vendition, as in the instances of licenses to peddlers, the imposition of duties on goods sold

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at auction, and the restrictions upon the sales of medicines by apothecaries in New York city." "It surely can be no objection to a charge for a license to pursue a particular occupation, that the grantee may deal to some or a considerable extent in foreign goods upon which duties have been paid."

Fourth. It is also contended that the act is void because it contains a prohibition against giving away one's property; and the point is illustrated as follows, to wit: "It might be that a person who was refused a license, but who owned a large stock of liquors, would desire to make them a present to one who had received a license; this act would prevent his doing so."

Now, it is perfectly manifest, that the act works no such results. The plain and obvious meaning of the prohibition against giving away liquor was to prevent fraudulent violations of the law—such as charging 20 cents for a cracker and giving a glass of brandy with it, and other like subterfuges.

The most startling announcement upon this point, however, was made by Recorder HACKETT, who said "if this excise act be valid, every person who gives his guests a glass of wine commits a misdemeanor." Only think of it—all the *bon ton* of New York and Brooklyn subject to indictment and liable to be sent to the penitentiary! Why, before to-morrow morning Fifth avenue may be in the tombs and Clinton avenue in the station house. To say that such a construction is opposed to common sense will not do, because judicial wisdom has declared it. To appeal to the *Behan case* (3 *Par.* 687) decided by the court of appeals, holding the rule of construction to be "simply a question of legislative intent," is of no avail, because "old things are passed away; behold all things are become new."

One has but to read a few modern decisions, to know what fools MARSHALL, CATRON, SPENCER COWEN, KENT and many other so called jurists were.

The law is unconstitutional, because "in overruling the demurrer now interposed, one duty would alone remain to

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the court, which would be to sentence the defendants under the law, for a misdemeanor, and to the penitentiary. In misdemeanors there is no *respondia ouster* after demurrers. On the other hand, if the demurrers are sustained for either of the various causes assigned by the counsel for the defendants, the decision of this court should be respected by the various magistrates and peace officers, until reversed by a higher and appellate court."

To prevent the defendants from going to the penitentiary, and render a decision to be "respected by magistrates," were certainly grave considerations against the constitutionality of the law.

Again, "whoever takes the trouble to read the old statutes of England on this subject, learns from recitations of the facts therein made that the enforcement of this class of laws was always difficult."

Certainly, laws "difficult to enforce," must be unconstitutional. Especially so, as no man is allowed to sell under it, except he be of "good moral character;" and "nothing was said upon the argument as to the mode by which the board practically acquainted itself with the subject of character."

But, seriously, are such arguments as have been adverted to, entitled to any consideration whatever?

The very fallacy of the whole tenor of the recorder's reasoning is a strong argument in favor of the validity of the law.

Constitutional rights are clear, specific and well defined, and do not require such technical quibbles to demonstrate them.

Fifth. It was stated on the argument before the recorder that the act was in conflict with the constitution, because section 10 of the act authorizes sheriffs, &c., "on the mere statement of a licensed person that there has been any disturbance, disorder or breach of the peace in his place, without any oath or warrant, and though the offense does not occur in presence of the officer, to cause all persons in the place to be removed therefrom."

The above is an entire misapprehension of the whole

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scope of that section. It is the person keeping the place who is authorized to do all the things specified in that section, and he may simply call in the assistance of such officer. In other words it simply authorizes the person to keep an orderly, well regulated place, which he would have the right to do without the assistance of this section.

Sixth. In fact there is no authority conferred upon officers by this law, that they have not for centuries possessed.

It is the common law right of officers to arrest without process, for misdemeanors committed in their view. That is precisely what they are authorized to do under this act, as I understand it. They "shall forthwith arrest all persons who shall violate any of the provisions of this act" (§ 10). How can the officer comply with this provision, except the violation is committed in his view? It does not say he shall arrest upon information of some other person. But shall "forthwith," that is, then and there, at the time of the commission of the offense. Is not that the plain and obvious meaning and intent of this section? It seems to me it does not admit of a doubt.

While courts should be zealous in guarding the rights of citizens, the good order and well being of the community are subjects entitled to some consideration.

Seventh. The proposition that the whole law is "unconstitutional and wholly void," because it impairs the obligation of contracts, cannot be sustained for a moment.

That this act in terms revokes all pre-existing licenses for the sale of intoxicating liquors, will not be denied.

It was strictly within the power of the legislature thus to revoke an unexpired license. No limitation to the power of the legislature in this respect can be pretended, except such as may be found in that clause of the constitution of the United States which forbid the obligation of contracts to be impaired. And that clause has no application to the exercise of police power, such as the granting, withholding, and revoking of a license, and similar acts. (*Calder* agt. *Kirby*, 5 *Gray*, 597; *State* agt. *Holmes*, 38 *N. H.* 225; *Hine* agt. *State*, 1 *Ohio State*, 15; *Coates* agt. *Mayor* 7 *Cow.* 585;

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Stuyvesant agt. *Mayor*, *Id.* 588; *Corporation, &c.* agt. *Mayor*, 5 *Cow.* 538; *Butler* agt. *Pennsylvania*, 10 *How.* 416; *Gossler* agt. *Corporation, &c.* 6 *Wheat.* 697; *Lindenmuller* agt. *People*, 33 *Barb.*; *Baker* agt. *City of Boston*, 12 *Pick.* 184; *Alzer* agt. *Weston*, 14 *John.* 231; *People* agt. *Morris*, 13 *Wend.* 325-329.) The court, in the case of *Hine* agt. *State*, quoted *supra*, say: "Connected as the subject is with the public police and domestic regulations of the state, the legislature had the power, on the ground of protecting the health, morals and good order of community, to revoke or provide the mode of revoking the unexpired licenses granted under the act of 1851."

In *Gatzmuller* agt. *People*, (14 *Ill.* 142), upon this subject the court said: "These powers of general legislation on public subjects are functions which government cannot be presumed to have surrendered, if indeed, they can under any circumstances be justified in surrendering them."

Upon the same point the court is also referred to the remarks of ex-Judge BOSWORTH, made before the police board, and published on Saturday last.

Eighth. I will simply call your honors' attention to the familiar principle that a part of a law may be void by reason of its repugnancy to the constitution, and the other part may be valid, unless the two parts are so blended together, that the one cannot be enforced without the aid and existence of the other. I do not propose to elaborate this point, because, I do not see anything in the law calling for the application of that principle.

With these hastily prepared and desultory observations, I will close what I have to say by a very few general remarks, which I feel called upon as prosecuting officer to make.

Shortly after the passage of this law I was called upon at a public meeting for my opinion as to its validity. I believed then, as I now do, that the law was constitutional, and so stated; at the same time advising them to obey it. I have had no occasion since to regret what I then said, and would not if I could, change a single word I then uttered. I then and now believe that it is for the interest of those

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engaged in the liquor business to obey the law. I then believed and now know, that they are being misled by lawyers who believe as firmly as I do in the constitutionality of this law. Ask these lawyers their opinions and one will say "The law is perfectly constitutional;" another that his object is to "block up the courts;" another, the purpose is delay, "that his clients in the meantime can make more than enough to pay costs;" and again, that "courts dare not enforce it, and juries will not convict." These remarks have no application whatever to the learned counsel in this case. To all such I say, that courts in Kings county dare enforce, the public officer dares prosecute, and jurors will convict upon proper testimony.

Yet, notwithstanding the fierce denunciations against the law, the promises of immunity held out to them by certain lawyers; notwithstanding that injunctions in favor of liquor dealers have almost been forced upon them by Judge CARDOZO, whose injunction mill has ground them out at the rate of about twenty a minute, to the great scandal of the judiciary; notwithstanding the captivating advertisements, which appear as thick as leaves in Valambrosa, offering free rum, easy injunctions, and "no questions asked," over six thousand persons have complied with its provisions by taking out licenses, and many of these since the injunction mill has been in full operation.

Are those who have complied with the law entitled to no consideration, to no protection? Is it right and just that those who defy the law should enjoy the same privileges as those who obey it? Is it not an imperative duty to protect those who have complied with the law in the enjoyment of their rights?

Does not justice to these men, to society, and to humanity call upon us to do our whole duty in maintaining and executing this law?

But it is called an infamous, an odious, a tyrannical and oppressive law.

Tell me that a law is infamous that leaves our police courts almost desolate and abandoned on Monday morning? Tell

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me that a law is odious that lessens by one-half, the number of arrests for drunkenness, disorders, and breaches of the peace on Sundays? Tell me that a law is oppressive and tyrannical that leaves hundreds of fathers of families to spend their Sunday nights at home, instead of in the station houses? Away, railers against the law, with such arguments, instigated by a false policy, and speak out the honest sentiments of your hearts, and the drunkard for whom you plead, and his famishing children, against whom you plead, will bless you.

But one word in conclusion, and I leave the case with my learned associate. I am fully aware that this, as the former law, affects a large class of our citizens, who, as a general thing, use light drinks, containing but a very small percentage of intoxicating properties. I maintained, when in the legislature, and have ever since advocated, that true temperance would be promoted by encouraging the more general use of light drinks, such as lager and the various kinds of light wines; and I have no doubt the legislature will in time see the necessity of such encouragement.

But until this law is changed, or modified by the legislature, I trust it will not be set aside on slight and trivial grounds.

PHILIP S. CROOKE, *counsel for People.*

1. The legislative power is restricted only by the constitution of the United States and of this state. (*1 Kent's Commentaries*, p. 448; *Burch* agt. *Newbury*, 10 *N. Y. Rep.* 392; *Leggett* agt. *Hunter*, 19 *N. Y. Rep.* 445; *Grant* agt. *Courter*, 24 *Barbour*, 238.)

2. The constitution should not be invoked unless upon occasions which both require and deserve its interposition. (*The People* agt. *Supervisors of Orange*, 27 *Barbour*, 594. *EMOTT, J.*)

3. "Deprived." The meaning of the word "deprived," as used in section 6 of article 1 of the constitution, is the same as the word "taken" in the same section. And

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when property is not seized and directly appropriated to public use, though it be subjected, in the hands of the owner, to greater burdens than before, it is not contrary to section 6. (*Abbott's Digest*. vol. 1 p. 658, and cases cited; *Grant agt. Courter*, 24 *Barbour*, 232.)

4. The prohibitory law of 1855 was not an excise law; the decisions of *Wynehamer* and *Toynbee* are not applicable. The act of 1855 ordered the confiscation and destruction of property.

5. The title of the act of 1866 is complete and correct. "The title must express the *subject*, not object of the act." "An abstract of the law is not required in the title" (*People agt. Lawrence*, 36 *Barbour*, 177).

6. The 10th section of the act of 1866, which has been complained of as investing the police with unconstitutional powers, has been misstated. It directs the licensed person to give notice of disturbances in any place so licensed, to the police. And the licensed person (not the police) shall cause all persons to be removed therefrom, and the place to be closed, and kept closed until quiet is restored. In this section, the police are merely recipients of the notice.

7. Arrests for misdemeanors "forthwith" to carry the offender before a magistrate, are not unconstitutional—an arrest, forthwith, is an immediate arrest.

8. It is the duty of the police to compel the observance and prevent the violation of all laws; the 20th section of the act is merely declaratory thereof. The direction "if necessary, by summarily closing and keeping closed any place in which shall be violated any of such provisions," is a mere police enactment, similar to many others on our statute books. The necessity of preventing riot—and the breach of the peace would justify it.

9. The validity or constitutionality of the act would not be invalidated by any of the provisions designed to prevent or punish its infraction.

10. The legislature have full power to make excise regulations for any portion of the state.

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A. OAKLEY HALL, *district attorney of N. Y. on same side.*
(*His points used in the cases before Judges CARDOZO and*
HACKETT.)

He rose for the purpose of opening the argument for the people, not in anywise intending to reply to the learned counsel on the other side. He had not examined this case with the particularity which its importance would seem to demand, for the reason that he was busily engaged and depended upon the able associate counsel (Messrs. Tracy & Bliss), who had given the matter such full examination. Here were four-fold indictments: 1st. For selling liquor without license. 2d. Being licensed, that they sold on Sundays. 3d. Selling liquor on Sunday, licensed or unlicensed; and 4th. Selling between 12 o'clock at night and sunrise.

1. Before a court will pronounce a law unconstitutional, a case must be presented in which there can be no rational doubt.

2. The constitution is to be liberally construed in upholding the constitutionality of statutes.

3. In construing constitutions, the court have nothing to do with arguments *ab inconvenienti*, for the purpose of enlarging or contracting its import—the only sound principle being to declare *ita lex scripta est*—and to follow and obey.

4. Courts at *nisi prius* are in practice both to hear and treat constitutional questions—forcing the litigant to moot them in banco and the higher tribunals.

5. Such of the defendants who are here licensed, and offending under the police regulations of this license statute, cannot raise this unconstitutional question. Because they have accepted the act.

6. This whole law is in no part prohibitory, but is entirely regulatory, and is outside of the opinions in the *Toynbee and Wynhamer cases*.

7. This act is simply an act of local police regulation, supplemental to the metropolitan police law, and in aid of it.

8. In fine, the statute follows the admitted law, that such intoxication as occasions or threatens disorder to the com-

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munity is a criminal indulgence. This civil statute has two regulatory branches: *First*. It says no man shall sell liquor without asking permission of the law to do so, to the end that he may better restrain this criminal indulgence of others. *Second*. Those who get this permission shall, in matters of police regulations, respect the Sabbath, and shall not infringe upon the rights of parents and children.

9. Nor is the law unconstitutional because it is a local law, expressing in its title more than one subject. The law expresses only one subject—the regulation of the sale of liquors.

10. It is a fallacy to say that an act not morally wrong, or criminal *per se*, cannot be penally visited.

Mr. Tracy responded to the argument of Mr. Brady, that if the counsel was sustained in the monstrous proposition advanced, no excise law which could be enacted would be valid. The whole spirit of the law was to regulate the sale of intoxicating liquors, and he contended its execution would have a beneficial effect.

CHARLES TRACY, GEORGE BLISS, JR. and A. J. VANDER-
POEL, on same side. (*Their points used in the cases
before Judges CARDOZO and HACKETT*).

1. We deny that the act of April 14, 1866, is unconstitutional.

It is to be remembered that the courts are bound to presume everything in favor of a law passed by the legislature, and that it is to be declared void only when no other conclusion is possible. (*People agt. Huntington*, 4 N. Y. Legal Obs. 188; *People agt. Supervisors of Orange*, 17 N. Y. 235, 241; *Sun Mutual Ins. Co. agt. City of New York*, 5 Sandf. 10.)

And that the constitution is to be liberally construed in upholding the validity of statutes. (*People agt. Supervisors of Orange*, 27 Barb. 575, 593.)

2. It is further to be remembered, that a provision in a law which may be in the opinion of the court unconstitu-

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tional, does not necessarily vitiate the whole law. It may be unconstitutional in part, and constitutional in part. It is only where the unconstitutionality is inwrought into the very framework of the law that the whole falls. For instance, the nineteenth section of the act of April 14, 1866, may be held unconstitutional, and the rest of the act still remain. The same is true of the tenth, eleventh, twelfth, thirteenth, fifteenth, twentieth, twenty-first and twenty-third sections. One or all of them may fall, and the act still stand. This is probably true of other sections. We only mention these, because these have been attacked by different persons. It is even true of parts of sections. The provision as to keeping in the third section may be held invalid without invalidating the rest of the section. (*Commonwealth* agt. *Hitchings*, 5 *Gray*, *Mass.* 482; *Commonwealth* agt. *Clapp*, *Id.* 99; *License Cases*, 5 *How. U. S.* 504; *Sedgwick on Construction of Statutes*, 489.)

In the case in *Howard*, the law in its application to imported liquors was admittedly unconstitutional, yet the indictments were sustained by the supreme court of the United States. In the other cases the point is directly decided.

3. In what respect, then, is the act of April 14, 1866, unconstitutional?

So far as we know, it has been attacked upon the following somewhat numerous grounds:

1. Because it interferes with the obligation of contracts.
2. Because it deprives persons of their property.
3. Because it violates the constitution of the United States by preventing the sale of imported liquors.
4. Because the law confers legislative powers upon the board of excise.
5. Because it makes criminal an act innocent in itself.
6. Because it deprives persons of liberty without due process of law.
7. Because of the provision for the appointment of the board.
8. Because it introduces new rules of evidence.
9. Because so far as Westchester is concerned, it is a prohibitory law.
10. Because the moneys raised are unconstitutionally appropriated.
11. Because there is no sufficient repealing clause.

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12. Because the title is not in accordance with the constitution. 13. Because it prevents a man from giving away his own property. 14. Because it interferes with the free enjoyment of Sunday. 15. Because it makes what are designated as geographical crimes. 16. Because part of the moneys raised are to be expended out of the county and district in which they are raised. 17. Because it confers judicial powers on the board. 18. Because the jurisdiction of the inspector of excise is more extensive than that of the board. 19. Because it confiscates property, inasmuch as it forbids giving it away without a license, and provides for no license for giving it away. 20. Because it requires a man to close his premises.

We believe these are the only points on which it has yet been claimed to be unconstitutional.

Let us examine these objections in detail:

1. As to interfering with the obligation of contracts.

(a) So far as there is anything judicially before this court, there are no contracts with which it interferes.

(b) But it may be said there were outstanding licenses granted under the law of 1857, which had not expired when the law of 1866 took effect, and hence the latter act impaired the obligation of these contracts.

To this we make several replies:

First. A license is not a contract within the meaning of the constitution of the United States. This is so both by the very meaning of the word license and by the decisions. A license cannot be property or the subject of contract. It cannot be assigned or taken on execution, (*State agt. Holmes*, 33 *New Hamp.* 225; *Calder agt. Kirby*, 5 *Gray*, 597; *Hirn agt. State*, 1 *Ohio State* 15; *Phalen agt. Virginia*, 8 *How. U. S.* 167; 2 *Parsons on Contracts*. 538; *Parkinson agt. Maryland*, 14 *Md.* 184. *Toledo Bank agt. Bond*, 1 *Ohio State*, 654.)

Second. Licenses to sell liquors are a portion of the police system of the state, granted in the exercise of its police powers, and not the subject of contract within the meaning of the constitution of the United States. (*Coates agt. Mayor*,

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7 Cow. 585 ; *Stuyvesant* agt. *Mayor*, Id. 588 ; *Brick Church* agt. *Mayor*, 5 Cow. 538 ; *Mayor* agt. *Second Ave. R. R. Co.* 32 N. Y. 261, 272 ; *S. C. below*, 12 Abb. 364, 374 ; *Mayor* agt. *Brittan*, 12 Abb. 367, 369, note ; *State* agt. *Mayor*, 3 Duer, 148 ; *Wynehamer* agt. *People*, 13 N. Y. 378, 411, per JOHNSON, J. ; *City of New York* agt. *Miln*, 11 Peters 102, 138.)

Third. Even were these powers the subject of contract, it was not within the power of the legislature to barter them away. Even had the legislature enacted in express terms that licenses under the act of 1857 should be irrevocable, they could not thereby have bound their successors. (*Butler* agt. *Penn.*, 10 How. U. S. 416 ; *Thorpe* agt. *R. & B. R. R. Co.* 27 Vermont, 141 ; *Brewster* agt. *Hough*, 10 N. H. 138 ; *Mott* agt. *Penn. R. R. Co.* 30 Penn. 9 ; *Charles River Bridge* agt. *Warren Bridge*. 11 Pet. 548 ; *People* agt. *Mayor*, 32 Barb. 112 ; 2 *Parsons on Contracts*, 538 ; *East Hartford* agt. *Hartford Bridge Co.* 10 How. U. S. 533.)

Fourth. But the licenses under the act of 1857 are, by the very terms of the act, revocable, and the power of revocation thus reserved may be exercised by the legislature as well as by the court, for it is to be remembered, that in such cases every presumption is in favor of the retention of power by the state and against the grantee. (2 *R. S.* 5th Ed. 940, § 5 ; *Laws of 1857*, Chap. 628, § 4 ; *Jefferson Branch Bank* agt. *Skelly*, 1 Black. U. S. 446.)

Fifth. It is by no means clear that the act of 1866 even attempted to revoke the licenses granted under the act of 1857.

Sixth. Granting that the licenses under the act of 1857 were valid contracts, which the law of 1866 undertook to revoke, and that this could not constitutionally be done, this still does not invalidate the whole law. It is still valid as to all but those having unexpired licenses under the act of 1857, while such persons, if indicted for violations of the act of 1866, have only to produce their licenses. This is a very different case from the law of 1855, in its operation as a prohibitory law, which, it was held, did not permit a distinction

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between liquors on hand at the time of its passage and those procured afterwards. (*See cases already cited.*)

2. As to depriving persons of their property without due process of law—

We answer that no one is *deprived* of his property. No property is *taken*. Its use only is regulated, and such regulation is perfectly constitutional. Every license law that ever was passed, every health law, and thousands of laws and municipal regulations, do this. (*Wynehamer* agt. *People*, 3 *Kern*. 386, 398, 401, 422, 435; *People* agt. *Toynbee*, 2 *Parker's Crim. R.* per SELDEN, J., 515, per HUBBARD, J., 552; *Brick Church* agt. *Mayor*, 5 *Cow*. 538; *Coates* agt. *Mayor*, 7 *Cow*. 585; *State* agt. *Mayor*, 3 *Duer*, 148; *Grant* agt. *Courter*, 24 *Barb*. 232; *People* agt. *Mayor*, 32 *Barb*. 112; *Beecher* agt. *Farrar*, 8 *Allen Mass. R.* 325; *Baker* agt. *Boston*, 12 *Pick*. 184; *East Hartford* agt. *Hartford Bridge Co.* 10 *How. U. S. R.* 533; *Commonwealth* agt. *Alger*, 7 *Cush. Mass.* 53, 84; *Commonwealth* agt. *Tewkesbery*, 11 *Met. Mass.* 55.)

The so-called boat law of 1866, under which convictions have been had in this city, is an instance of a similar regulation.

3. As to violating the constitution of the United States.

This act does precisely what the supreme court of the United States has held legal. (*License Cases*, 5 *How. U. S. R.* 504; *Brown* agt. *Maryland*, 12 *Wheat*. 419, 441; *People* agt. *Huntington*, 4 *N. Y. Legal Obs.* 187; *Smith* agt. *People*, 1 *Parker's Crim. R.* 583.)

In the license cases (5 *How.*), the laws of the states forbade sales in less quantities than 28 gallons. There was no exception of imported liquors, and yet the laws were held constitutional.

Moreover, the United States law does not allow importations in quantities smaller than five gallons, and sales of that amount are not affected by the law of 1866.

4. As to conferring legislative powers. The only powers objected to are the right to fix the license-fee at any sum from \$30 to \$250.

There is nothing in the constitution forbidding this. All

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that is forbidden is devolving upon the people of the state the legislative power. (*Bank of Rome* agt. *Village of Rome*, 8 N. Y. 44; *Starin* agt. *Town of Geneva*, 23 N. Y. 446; *Mayor* agt. *Ryan*, 2 E. D. Smith, 371; *Tanner* agt. *Trustees of Albion*, 5 Hill, 121, 131; *Stokes* agt. *Carpenter*, 14 Wend. 88.)

5. As to making criminal acts which are innocent in themselves.

Where is there any provision of the constitution forbidding this?

The 11th, 12th and 13th sections have been especially objected to. Similar provisions are to be found in almost every excise law that has ever been passed in this state. (See *Law of March*, 1788, chap. 48; *Law of 1832*, chap. 135.)

The bottle act, so-called, which made an innocent act criminal, has been upheld by the court of appeals (*People* agt. *Mullins*, 34 N. Y. 398).

6. Because it deprives persons of liberty without due process of law.

The 10th, 19th and 20th sections are especially objected to.

The 10th section simply gives the owner of premises power to clear them, that is, to revoke the permission under which persons came there, a power he had without the law, and which it is not unconstitutional to put into a statute, or to authorize the police to assist him in executing.

The 19th and 20th sections give power to police officers to close places and to arrest without warrant.

How is this unconstitutional?

An officer may, independently of the statute, arrest for a felony without having a warrant, even if he did not see the offense committed (*Holly* agt. *Mix*, 3 Wend. 350).

There is no provision in the constitution forbidding such an exercise of this power as given in those sections.

It is the business of the police to enforce all laws, and a power to arrest "forthwith," is constitutional. If it is held that such power is unconstitutional when the officer does not see the offense committed—which we deny—we answer, that

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the section may well be construed as referring only to offenses witnessed by the officer, and that if such construction is necessary to uphold the section, it must, on the principle already stated, be given to it. In the same way as to closing the premises: Is it not constitutional to give power to the police to close a place where a riot or where a breach of the peace is in progress, and does this differ in principle?

7. As to the mode of appointment of the board.

This is strictly in accordance with the decision of the court of appeals in *People* agt. *Draper* (15 N. Y. 532); *People* agt. *Pickney* (32 N. Y. 377).

8. As to the introduction of new rules of evidence.

It will be difficult to find anything in the constitution forbidding this, even if it is done.

The mineral water bottle act provided that mere possession of bottles, which had the maker's mark on them, but had been sold by him, should be evidence of criminality, and this has been sustained by the court of appeals. (*Laws of 1860, ch. 117*; *Mullins* agt. *People*, 34 N. Y. 398; *Hand* agt. *Ballou*, 12 N. Y. 541.)

But no new rule of evidence is introduced. All that is required is, that a man having a license must show it (§ 5), and such is the rule now. (*Potter* agt. *Deyo*, 19 Wend. 361; *Sheldon* agt. *Clark*, 1 Johns. 511; *Mayor* agt. *Mason*, 1 Abb. 344.)

9. As to being a prohibitory law, so far as Westchester county is concerned.

A reading of the law shows that the whole scope and purport is to exempt Westchester county from its operation. The wording is in some cases awkward, arising from the fact that the law as originally drawn included the whole metropolitan district, but was amended during its passage through the legislature so as to exclude Westchester.

10. As to the appropriation of the moneys raised.

Article 7, section 8 of the constitution refers to moneys paid out of the state treasury, and has no application to a case like this.

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This is more like the case of fees accruing to officers. (*See Hand agt. Ballou*, 3 Kern. 541).

11. As to the repealing clause.

Had it been wholly omitted, it would hardly have been contended that the constitutionality of the law was thereby affected, and its introduction certainly does no more. It provides substantially that the act of 1857, and all other acts, so far as they are inconsistent with the act of 1866, shall have no application to the new district created.

12. As to title.

(a) It accurately and strictly describes the territory included in the district. It is all within the metropolitan police district.

(b) There is no requirement of the constitution as to the degree of particularity to be used in this respect. (*Brewster agt. Syracuse*, 19 N. Y. 117; *Sun Mutual Ins. Co. agt. Mayor*, 4 Seld. 241.)

(c) It is not a local act (*Phillips agt. Mayor*, 1 Hilton, 483).

(d) It does not embrace more than one subject, and that is expressed in its title. Every provision in it is connected with its main subject. (*Connor agt. Mayor*, 1 Seld. 285, 297; *Thorp agt. Mayor*, 31 Barb. 572; *Sun Mutual Ins. Co. agt. Mayor*, 4 Seld. 240; *People agt. Lawrence*, 36 Barb. 177; *Outwater agt. Mayor*, 18 How. 572; *Joyce agt. Mayor*, 20 How. 439.)

(e) Even if it embrace more than one subject, that does not render the whole law void. (*Fishkill agt. F. & B. Plankroad Co.* 22 Barb. 634; *People agt. Same*, 27 Barb. 445; *People agt. McCann*, 16 N. Y. 58; *People agt. Lawrence*, 36 Barb. 177, 184.)

13. As to preventing the giving away of property.

This is merely a provision against publicly giving away, obviously inserted to prevent evasion of the law, "striped pigs," and the like.

14. As to Sunday.

The provisions of the law are strictly constitutional, and moreover, are the same in substance as are contained in the act of 1857, the constitutionality of which has been affirmed

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by the court of appeals. (21 N. Y. 173; *Lindenmuller* agt. *People*, 33 Barb. 548; *People* agt. *Hoym*, 20 How. 76.)

15. As to "geographical crimes," by which is meant making it a crime to do in the district created that which is not criminal out of it.

The law of 1845 (*chap.* 300), and of 1846 (*chap.* 14), left it to the people in each town to decide whether the license system should apply to them, and no one ever contended that in this making "geographical crimes" it was unconstitutional. But as to this objection, *Williams* agt. *People* (24 N. Y. 405, 407), is conclusive.

16. Because it provides for expending a part of the moneys outside of the town and district in which it is raised.

If the objection is that a portion of the moneys raised goes to the inebriate asylum at Binghamton, is it unconstitutional that a business which tends to make drunkards should contribute to cure them, especially since, as there is a similar provision in the law of 1857, the rule is general throughout the whole state?

If the objection is that moneys raised from the liquor dealers in the country towns in Queens county, where there is no metropolitan police force, goes to the support of that force, the reply is, that this is nowhere forbidden in the constitution, and that this may have been a mode adopted by the legislature to induce those towns to avail themselves of power given them to have the metropolitan police extended to them.

17. Because it confers judicial power.

The only power of this nature which is conferred is that of revoking licenses. It needs only a statement of the case to show the absurdity of this objection (*But see Sill* agt. *Village of Corning*, 15 N. Y. 297).

18. As to the jurisdiction of the inspector of excise.

He is (§ 2) to be in the metropolitan police district, and to be charged with such duties as the board "can and shall delegate to him." As they have no duties or powers in Westchester, they can delegate none to him there, hence his

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power is, geographically speaking, only co-extensive with theirs.

19. Because the law provides for no license to give away liquor, and yet forbids it to be given away without a license.

As already shown, it only forbids the publicly giving away. A license is provided to "dispose of" liquors. Is not giving away, disposing of them?

20. Because it requires a man to close his place of business on Sunday and at certain hours, and it is said his place of business may be his house, to which he must have access.

No man is obliged to rent his house as a liquor shop, and if he chooses to do so, he subjects himself to all the inconveniences attached to that business.

Moreover, the law is to be construed reasonably, and not to mean that a man cannot have access to his residence. He must close it as a place of business.

After this minute examination of the objections, it is to be remarked, that even if those numbered 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19 and 20 are, one or all, held to be unconstitutional, such a conclusion in no manner affects the remainder of the law, and therefore in no way benefits the plaintiff.

In this connection it is to be observed, that most of the objections proceed upon an erroneous idea of the constitution of this state. It assumes that the legislative power is more limited than it is. The legislature has all the power not expressly withheld from it by the constitution, and any one objecting that a law or provision is unconstitutional, must, therefore, point out the clause that is infringed. (*Leggett* agt. *Hunter*, 19 N. Y. 456, and cases cited; *People* agt. *Morrell*, 21 Barb. 563; *Butler* agt. *Palmer*, 1 Hill, 324; *Bloodgood* agt. *M. & H. R. R. Co.* 18 Wend. 9; *Burch* agt. *Newbury*, 10 N. Y. 392; *Grant* agt. *Courter*, 24 Barb. 238.)

The provisions in the act of 1866 most strenuously objected to, are nearly all to be found in former excise laws.

Section 8 is substantially in the law of 1857. Section 11 in that of 1788. Section 12 in those of 1822 and 1857. Section 13 in that of 1857, and so on.

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Even if those holding licenses under the act of 1857, had had valid contracts which the legislature could not impair, they could consent to surrender and waive them, and by seeking, accepting and paying for licenses under the law of 1866, they waived any rights under their former licenses. (*Embury agt. Connor*, 3 *Comst.* 518; *People agt. Murray*, 5 *Hill*, 488; *Baker agt. Brannan*, 6 *Hill*, 47.)

In the civil cases the following additional points were urged :

Even if the plaintiff has acquired a vested right under his old license, and had not waived it, the injunction cannot be sustained.

1. Because an injunction will not lie to interfere with the powers granted to the board of excise after they have exercised them. Their proceedings may, perhaps, be reviewed upon *certiorari*, but pending their exercise they cannot be interfered with by injunction. (*Leigh agt. Westervelt*, 2 *Duer*, p. 618; *Ex parte Persons*, 1 *Hill*, p. 655.)

2. An injunction will not lie against the officers of the state, though the court may believe the law unconstitutional (*Thompson agt. Commissioners*, 2 *Abb.* 250).

3. Because no injunction lies, where there is a good remedy at law, and this is so since the union of law and equity in the same court. (*Mayor agt. Mersevole*, 26 *Wend.* 132; *N. Y. Life Insurance Co. agt. Supervisors*, 4 *Duer*, 198; *Thompson agt. Commissioners*, 2 *Abb.* 250; *Chemical Bank agt. Mayor*, 1 *Abb.* 79; *Heywood agt. Buffalo*, 14 *N. Y.* 534; *Albany Northern Railroad agt. Brownell*, 24 *N. Y.* 348.)

(a) Plaintiff has a perfect remedy at law if arrested, and his views of the law are correct, he can plead them and be discharged (*Sterman agt. Kennedy*, 15 *Abb.* 204).

(b) It is not a case in which equity interferes to prevent a multiplicity of suits. (*West agt. Mayor*, 10 *Paige*, 539; *Jerome agt. Ross*, 7 *Johns. Ch.* 336; *Bouton agt. City*, 15 *Barb.* 392).

(c) Nor is it a case of irreparable injury; and even if it was, it must be an irreparable injury to the freehold which justifies the interference of equity. (*Gilbert agt. Mickle*, 4

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Sand. Ch. 357 ; *Heywood* agt. *City of Buffalo*, 14 *N. Y.* 534 ; *Jerome* agt. *Ross*, 7 *Johns. Ch.* 331 ; *Mutual Benevolent Life Insurance Co.* agt. *Supervisors*, 33 *Barb.* 22 ; *Thompson* agt. *Matthews*, 2 *Edw.* 212.)

(*d*) If the defendants arrest the plaintiff, close his place, or do any other similar act without authority of law, it will be a mere trespass, and an injunction does not lie to prevent that. (*Mayor* agt. *Connover*, 5 *Abb.* 171 ; *Jerome* agt. *Ross*, 7 *Johns. Ch.* 331 ; *Bouton* agt. *City*, 15 *Barb.* 392, 394 ; *Van Rensselaer* agt. *Griswold*, 3 *N. Y. Leg. Obs.* 94.)

4. The plaintiff is seeking not a right, but is appealing to the equitable consideration and powers of the court. He should, therefore, come with clean hands. But it appears that since the injunction was granted, he has openly and flagrantly violated the laws of the state, laws which were as binding upon him under the act of 1857 as under that of 1866. He has used the process of the court to protect him in violating laws which this court with others is bound to enforce. The court should not longer stay the arm of the criminal law.

LORT, J. It appears by the return to the habeas corpus in the matter, that De Vaucene is in custody on a complaint on oath made to a police justice, of the city of Brooklyn, alleging that he, the said De Vaucene, did on the 10th day of July, 1866, at the city of Brooklyn, unlawfully sell and dispose of a quantity of strong and spirituous liquors, to wit: a glass of applejack whiskey, contrary to the provisions of the third and eighth sections of an act entitled an act to regulate the sale of intoxicating liquors within the metropolitan police district of the state of New York, passed April 14, 1866.

None of the facts alleged in the return are denied, and it becomes necessary for the proper understanding and consideration of its effect to refer to some of the provisions of the act mentioned in the complaint. The first section of it constitutes and creates the persons who are and from time to time shall be commissioners of the metropolitan board of health, a board of excise in and for the metropolitan police

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district, excepting and excluding the county of Westchester, and declares that from and after the passage of this act they alone shall possess the powers and perform the duties of commissioners of excise within said metropolitan police district, except in said county of Westchester.

The third section then declares that from and after the 1st day of May, 1866, no person or persons shall within the said metropolitan police district, exclusive of the county of Westchester, publicly keep or sell, give away or dispose of any strong or spirituous liquors, wines, ale or beer, in quantities

NEW YORK COMMON PLEAS.

GEORGE W. HALL, *plaintiff*, agt. JACKSON S. SCHULTZ, WILLIARD PARKER, JOHN O. STONE, JAMES CRANE, JOHN SWINBURNE, THOMAS C. ACTON, JOHN G. BERGEN, BENJAMIN F. MANIERRE and JOSEPH S. BOSWORTH, commissioners of the metropolitan board of health, as such claiming to constitute a board of excise, in and for the metropolitan police district of the state of New York, excepting and excluding the county of Westchester. The (alleged) board of excise, in and for the metropolitan police district of the state of New York, excepting and excluding the county of Westchester, THOMAS C. ACTON, JOSEPH S. BOSWORTH, JOHN G. BERGEN and BENJAMIN F. MANIERRE, commissioners of the metropolitan police, of the metropolitan police district of the state of New York, "the board of metropolitan police of the metropolitan police district of the state of New York," JOHN A. KENNEDY and NATHANIEL R. MILLS, *defendants*.

JOHN GRAHAM, *for plaintiff*.

CHARLES TRACY, GEORGE BLISS, JR., and A. J. VANDERPOEL, *for defendants*.

NEW YORK COMMON PLEAS.

PAUL FALK agt. SAME, and JAMES G. BOGART, instead of NATHANIEL R. MILLS.

HENRY L. CLINTON, and STALLKNECHT and HALL, *for plaintiff*.

CHARLES TRACY, GEORGE BLISS, JR., and A. J. VANDERPOEL, *for defendants*.

The complaints in these cases alleged that the defendants were the board of excise, in and for the metropolitan police district of the state of New York, and part of them were also the board of police; that the plaintiffs had respectively licenses granted under the law of April 16, 1857, for which they paid thirty dollars each, and which would not expire till July 5th, 1866; that the defendants were proceeding to enforce the act of April 14, 1866, on a pretence that it superseded the former law and all licenses granted under it, while the complaint alleged that the act was itself unconstitutional and void. The plaintiffs further alleged that the act of 1866, imposed restrictions upon the sale of liquors which were not imposed by that of 1857, and that they took and paid for their licenses under the latter act, relying upon having all the privileges that it granted for the entire period of the licenses, and had, in reliance upon that, purchased a large quantity of liquors and incurred heavy expenses; that a large portion of their business

In the matter of James De Vaucene.

of less than five gallons at a time, unless as he or they may be licensed pursuant to the provisions of this act, and may be permitted by it; and the fourth provides that the said board of excise shall be subject to further provisions hereof; have power to grant licenses to any person or persons of good moral character, and who shall be approved by them, permitting him and them for one year, from the time the same shall be granted, to sell and dispose of at any one named place within the said metropolitan police district, exclusive of the county of Westchester, strong and spirituous liquors, wine, ale and

and profits arose from sales made at hours and days when the law of 1866, forbade sales to be made. Hall claimed no right to sell on Sundays, but Falk did. Falk claimed also that lager beer was not included under the provisions of the law of 1866. Both alleged that they should be exposed to numerous suits and arrests, and would suffer irreparable injury, if the defendants were not enjoined from enforcing the law of 1866.

The plaintiffs had applied for, received and paid for licenses under the law of 1866, but alleged that they had done it under compulsion.

The defendants maintained the constitutionality of the act of 1866, and denied that the plaintiffs would suffer any irreparable injury if that law was enforced. In Falk's case they also showed by affidavits, that pending the injunction he was keeping his place open, and selling liquors on Sunday to all comers, which they claimed was a violation both of the act of 1866 and of 1857. The defendants also denied that there was any compulsion used to induce the plaintiffs to apply for licenses under the law of 1866.

NEW YORK COMMON PLEAS.

JEREMIAH DRISCOLL agt. SAME, and THORNE, captain of police, instead of JAMES G. BOGART.

JOHN McKEON and FRED. SMYTH, *for plaintiff*.

CHARLES TRACY, GEORGE BLISS, JR., and A. J. VANDERPOEL, *for defendants*.

The facts in this case are briefly these :

The plaintiff is engaged in selling spirituous liquors in small quantities to be drank on the premises. He does not keep an inn, tavern or hotel. He has no license from any source. The defendants, with the exception of Kennedy and Cameron, are the board of excise, created under the law of April 14, 1866. The defendants, Acton, Bosworth, Manierre and Bergen, are the board of police. The defendants, Kennedy and Cameron, are officers under the control of the board of police, and in no manner subject to the orders of the board of excise.

The plaintiff alleges that the act of April 14, 1866, is unconstitutional and void; that the several defendants have combined to execute it, and will, by repeated arrests, and by closing his place of business, inflict upon him irreparable injury. To prevent this he asks the equitable interference of this court by way of injunction.

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beer, in quantities not less than five gallons at a time, upon receiving a license, fees to be fixed in their discretion, and which shall not be less than \$30 nor more than \$250.

The eighth section prohibits the sale by persons having such licenses on Sundays, and also on any day upon which a general or special election or town meeting shall be held, within one quarter of a mile from the place where the same shall be held.

The sixteenth section declares that every person who shall violate any of the previous provisions of the said act, shall for such offense be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than \$30 nor more than \$100, or with imprisonment for not less than ten days nor more than thirty days, or by both such fine and

The defendants deny all the plaintiff's allegations as to irreparable injury; they show that they have not seized and taken possession of the plaintiff's place of business, but that on the contrary, the defendant, Kennedy, the executive officer of the police, has especially forbidden this to be done.

The defendants, other than the board of police, Kennedy and Cameron, deny that they have anything to do with arresting the plaintiff or any one, or with enforcing the act of April 14, 1866, in any way. They deny all confederation with the other defendants.

The allegations of unconstitutionality, deprivation of rights and property, &c., &c., are all denied by all the defendants.

In the *Driscoll* case the following additional point was also urged by the defendants' counsel:

1. The plaintiff has no standing in court to ask its equitable interference. Even if his position is correct, that the law of April 14, 1866, is unconstitutional and void, the law of 1857 remains in full force, and the plaintiff is in constant and flagrant violation of that act. Yet he asks this court to protect him in carrying on that identical business. In other words, this court is asked, because one law is alleged to be unconstitutional, to protect the plaintiff in violating another act, the constitutionality of which has been affirmed by the court of appeals. (*Commissioners of Excise of Tompkins Co. agt. Taylor*, 21 N. Y. 173; *Laws of 1857*, vol. 2, pages 410, 411, §§ 13, 14; 1 R. S. 676, §§ 71, 72, part I., ch. 20, tit. 8, art. 8; *Laws of 1860*, page 448, § 42).

These laws it is the duty of the police to enforce, and the plaintiff seeks to forbid them by injunction. (*Laws of 1860*, pages 444, 445, §§ 29, 30.)

It is contrary to law and to equity for the court to grant him an injunction or to entertain his suit. (*Griffith agt. Wells*, 3 Denio, 226; *Bank of U. S. agt. Owen*, 2 Pet. 527, 539; *Seneca Co. Bank agt. Lamb*, 26 Barb. 595; *Thalmier agt. Brinkerhoff*, 20 Johns. 386, 397; *Pennington agt. Townsend*, 7 Wend. 276, 280; *Scott agt. Burton*, 2 Ashmead, 312; *Biddle agt. Ash*, Id. 211; *Morse agt. Machias*, 42 Maine 119).

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imprisonment, and in addition thereto, shall be liable to a penalty of \$50 for each offense, recoverable in a civil action in the name of said board of excise; and the twentieth section makes it the duty of every magistrate to entertain complaints for a violation of the provisions of this act made by any person under oath. The twenty-third section provides what disposition shall be made of the license fees and penalties, expressly declaring that nothing contained in the act shall divert from the state inebriate asylum such proportion of license fees as is now set apart for said institution by existing laws.

The act also contains several provisions prescribing the

HOLT agt. COMMISSIONERS of EXCISE, etc.

CARDOZO, J. Immediately on the submission of this case, being convinced that very little, if anything, could be added to the argument of the distinguished counsel for the plaintiff, and being informed by the learned counsel for the defendants, that he should not in the case of Falk against the same parties argue further any of the points which had been discussed in this case, and I must add that his argument already made had exhausted the subject—and the case being one of great public interest and importance, I commenced the examination of the matter, putting aside all other engagements, and devoting myself to it night and day, except when actually occupied in court, but intending nevertheless, to withhold my opinion until the Falk case had been finally submitted to me. But the proceedings before the several magistrates yesterday seem to demand that there should be no further delay, and that I should make known the results of my investigations, and I therefore proceed to express my views as follows:

George W. Holt agt. Jackson S. Schultz, et al.—On the 14th of April, 1866, the legislature of this state passed a law (*Chap. 578 of the Laws of 1866*), entitled “an act to regulate the sale of intoxicating liquors within the metropolitan police district of the state of New York,” by the third section of which it is provided that “from and after the first day of May, 1866, no person or persons shall within the said metropolitan police district, exclusive of the county of Westchester, publicly keep, or sell, give away or dispose of any strong or spirituous liquors, wines, ale or beer, in quantities less than five gallons at a time, unless as he or they may be licensed, pursuant to the provisions of this act, and may be permitted by it.”

The act creates a board of excise—points out who may be licensed, how application for licenses shall be made, and the duties of those who may become licensed; and compliance with its requirements is enforced by very stringent provisions. By the 16th section, it is declared that every person who shall violate “any of the foregoing provisions of this act”—to some of which I have referred—shall for each offense be guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both. The act contains many other sections, the constitutionality of some of which is disputed, but in the view I take of the case, no specific mention need be made of them.

Prior to the passage of this law, the plaintiff in this case, under the act of the legislature of April 16th, 1857, (*chap. 628, p. 405*), and in conformity with its pro-

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duty and regulating the conduct of the persons who may receive licenses under the said act, and in reference to the sale and other disposition of strong and spirituous liquors, wines, ale or beer, and imposes upon sheriffs, constables or officers of the police the duty of enforcing the said act, and confers upon them certain powers for the execution of that duty which, in the view I have taken of the case, it is necessary to refer to in detail, and concludes by declaring that all acts and parts of acts inconsistent with the provisions of the said act are thereby repealed, so far as the same shall apply to the said metropolitan police district, except the county of Westchester, and that the said act shall take effect immediately.

visions, procured from the then board of commissioners of excise for the city and county of New York, a license as an inn keeper "to sell strong and spirituous liquors and wines, to be drank in his house and on his premises," from the 7th day of June, 1865, until that license should "expire by operation of law, or be revoked for a violation of the provisions of the aforesaid act." By the 4th section of that act, all licenses "when issued shall be in force, unless revoked, until ten days after the third Tuesday in May next succeeding the granting of such license, and in the city of New York until fifty days thereafter." By the 26th section, which alone confers the right of revocation, the court of sessions is authorized in certain cases, and upon notice to the party interested, "to inquire into the circumstances and to revoke" a license granted to a person violating the provisions of the act. No right of revocation, except for cause, and to be exercised in the manner I have mentioned, is reserved by the act.

To procure a license under that law the plaintiff paid the sum of thirty dollars, the amount required of him by the then board of commissioners—fixed by them under and pursuant to the authority conferred by the second section of the statute. More than two months of the period specified in the license remained unexpired on the first day of May last, and no provision for compensation to the plaintiff for the loss of the unexpired term of that license is made by the act of 1866; nor is there any clause in it saving the rights of persons whose licenses had not then expired. Under these circumstances the plaintiff has filed his complaint, setting forth substantially the matters I have mentioned, and charging, among other things, that upon the faith of the license under the act of 1857, he had bought a large stock of wines and liquors, a considerable portion of which yet remains upon his premises and unsold; that he wishes and intends to exercise the powers and rights which he claims are secured to him by his first license, and to prosecute his business, notwithstanding the act of 1866, and he insists that if the defendants, or any of them, who are charged with the execution of the last mentioned statute, should cause him to be arrested, as they may do, for each violation of its provisions, which will be very numerous, he will sustain great and irreparable injury. A temporary injunction restraining any interference with the plaintiff or his business, upon the part of the defendants, by virtue or in pursuance of the act of 1866, was granted by me and argument has been made by dis-

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It appears to have been passed on the 14th day of April, 1866, and had, if valid, taken effect when the act complained of was committed. I have already stated that none of the allegations in the return were denied, and I here add that it was admitted by the counsel of De Vaucene on the argument, that at the time of the sale mentioned in the complaint made against him, he had no license from any excise board whatever authorizing him to make such sale, but he claimed and insisted that the act referred to therein, was unconstitutional and wholly void, and that consequently such sale did not constitute an offense for which he could be taken or detained in custody.

tinguished counsel upon both sides, upon a motion to continue it until final judgment in the action.

With the question, whether the act of 1866 be wise or impolitic—whether it be calculated to advance or to retard and prejudice the cause of temperance, I have, in my judicial capacity, nothing to do. To all arguments on those matters, and similar considerations, I have only to apply the spirit of the remarks which I made on another occasion, when it was argued that only a certain view of a legal proposition “would satisfy the public.” I said then, and I say now, “the question is not what will satisfy the public, but what does the law demand? With that everybody must and will be satisfied—for that is the law, and ours is a law-abiding community.”

Considerations of policy must be addressed to the legislature, not to those who are charged with the duty of expounding its enactments. I am sacredly obligated impartially to ascertain the law according to my best judgment, and when I have thus arrived at a conclusion I am similarly bound to declare it, whatever it or its consequences may be.

Three principal questions arise in this case.

First. Whether the plaintiff has such an interest as entitles him to a standing in court.

Second. If he has, whether the remedy by injunction is appropriate; and lastly, and most important, whether the act of 1866 is unconstitutional.

The defendants object that the plaintiff, by applying for and accepting a license under the present act, has surrendered any rights he might have had under his previous license, and that therefore, he cannot maintain this action; and of course, if it be true that he must ultimately be defeated in the suit, the preliminary injunction should be dissolved. But I cannot concur with the learned counsel for the defendants that any such surrender has been shown. It is not suggested that any formal release was executed by the plaintiff, nor that the license was ever delivered up to the defendants; but I am asked to infer its surrender from the mere fact of applying for a license under the statute in question. This I think unwarrantable. The plaintiff's application under the new statute was not incompatible with an intention to assert the validity of his old license. It was a precautionary act. If his old license were constitutionally destroyed by the recent legislation, he needed a new one. If the new statute were void, he could not give it vitality. He would get nothing by a grant under a void law, but he lost

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limited district of the state, but it relates to a subject affecting the general welfare and interest of the whole state, and not of that district only. At the time of its passage the excise act of 1857 (*chapter 628 of Laws, 1857*), entitled "an act to suppress intemperance and to regulate the sale of intoxicating liquors," which was applicable to the whole state, was in full force, and it is apparent from the provisions of the act in question, that its general scope and object were to alter the general law in reference to the board of excise, and to the other matters in which they are inconsistent. The effect of the change is to regulate a subject of vital interest and importance to the whole community by

Still it may be well to cite a few passages from Judge STORY's work on equity jurisprudence, which appear to be directly in point in this case. It should be remembered that this action seeks to protect property. Its object is to prevent irreparable damage to the business of the plaintiff, which, notwithstanding the opposing affidavit, the court must see, will follow, if he be interfered with as provided by the act in question. Such an interference amounts to a nuisance, which, it is well settled, will be restrained when private individuals suffer an injury distinct from that of the public in general.

In section 926 of his work on equity jurisprudence, Judge STORY says: "Where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection—in every such case courts of equity will interfere by injunction in furtherance of justice and the violated rights of the party." Again in section 928: "It is upon similar grounds that courts of equity interfere in cases of trespasses, that is to say, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation." Enough I think has been quoted to show that there can be no doubt of the right to grant an injunction to protect the property of the plaintiff. The learned counsel for the defendants erred in supposing that the cases cited by him are authorities against this view, or support his position that injunction should not be allowed, even if the statute be conceded to be unconstitutional. On the contrary, many of them, as well as the case of *Wood agt. Draper* (4 Abb. P. R.), decided by the present chief judge of the court of appeals, not cited by the counsel, admit that the remedy by injunction is a proper one, and only put the refusal to allow it upon some ground or defect of parties plaintiff, or want of proper allegations in the complaint. Thus, in *Wood agt. Draper*, (*supra*) when the right to grant an injunction was asserted and established, it was refused in that case, because it was held that the plaintiff, suing simply as a tax-payer, and having no interest in the subject matter, except that which was common to all the tax-payers of the city, could not maintain an action in his individual name, without an averment that the suit was brought on his own behalf, and "also on behalf of all others having a like interest." Again, in *Thompson agt. The Commissioners of the Canal Fund*, which was also a suit by a taxpayer, Mr. Justice MITCHELL said that relief by injunction was never granted merely to prevent an officer from carrying out a law of the state because it was deemed unconstitutional, unless some equity was at the foundation of the bill—

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two acts instead of one, and it is substantially the same in its operation as a single law would be, which declared that the sale of ardent and spirituous liquors in one portion of the state should be regulated in one way by certain regulations, and in the residue in another way by different regulations.

If, however, it be conceded that the act is a local one, it is nevertheless valid. It does not embrace more than one subject, which is the regulation of the use of ardent and spirituous liquors, wines, ale or beer, mentioned in the act, within the metropolitan police district and exclusive of Westchester; its different provisions all tend to that end, and the title

which is precisely the case here. Each of the other cases cited by the counsel will be found, upon a careful examination, to be either foreign to the present question or else to be an authority, though the remedy may have been refused in that particular instance, for asserting the propriety of allowing it whenever, as here, a fit case for it be made.

The second objection taken by the defendants' counsel, cannot, therefore, be sustained.

Is the act of 1866 unconstitutional?

Is it repugnant either to the prohibition in the federal constitution, the supreme law of the nation, which prevents any state from passing any law impairing the obligation of a contract (*art. 1, § 10, subdivision 1*), or does it contravene the fundamental law of our own state, which declares that "no person shall be deprived of life, liberty or property, without due process of law?" (*Art. 1, § 6.*)

I think it is opposed to both. I shall not stop to examine whether the act under review annuls the unexpired licenses issued under the statute of 1857. The learned counsel upon both sides concede and assert that it does, and therefore, I feel at liberty to assume it as indisputable. Nor is there any doubt that if the third section of the statute be void as to any class of citizens, that it is void as to all; because it is manifest that the act did not mean to, and does not create different classes, upon some of whom it should operate, and upon some of whom it should not. Nor is there any room to dispute that if that section is invalid, as it is such an important part, and indeed, the life and being of the whole scheme of the act, without which all the other provisions would be futile, the whole statute must share its fate and be declared unconstitutional. That these views respecting such an act as the one under consideration are sound, is conclusively established by *Wynehamer's case*, (13 N. Y. Rep. 378).

The sole question, then is, did the licenses granted under the act of 1857 create such a contract or vest such rights as cannot constitutionally be impaired or revoked. I do not doubt that the legislature, under its inalienable right, might, notwithstanding those licenses, have passed laws which should regulate the sale of liquor under them, but I have no hesitation in saying that, under pretense of regulation, a law cannot be sustained which, like the present, has the effect to render a previous grant void. This is not regulation, it is destruction.

I shall not review or express my views of the decisions of courts of other states which were cited by the defendants' counsel, and which he argued established,

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sufficiently expresses that subject. Although it refers to the whole of the metropolitan district, and does not except the county of Westchester, that omission is no objection. The district does, in fact, include all the territory to which the act especially relates, and the title also declares in general terms that the act regulates the sale of intoxicating liquors. This is sufficient; an abstract of all its provisions is not necessary. (See *The Sun Mutual Insurance Company* agt. *The Mayor, &c. of New York*, 4 *Selden*, p. 242; and *Brewster* agt. *The City of Syracuse*, 19 *N. Y. Rep.* p. 117, &c.; see also *The People* agt. *The Supervisors of Orange*, 17 *N. Y. Rep.* p. 235.) It has been decided that if any subject is

that such licenses as those in question conferred no vested right, but were revocable at pleasure: because, however learned the courts pronouncing them have been, and even if they go to the full extent which the counsel for the defendants contended they did, I cannot receive them as authority in this state, where I understand our courts to have clearly and plainly decided principles with which they are utterly inconsistent. Nor will it be necessary to consider and apply the numerous citations from the elementary books and the decisions of the courts of the United States, which were urged upon me by the learned counsel for the plaintiff—many of which bear pointedly upon the question involved—because that the license was *property*, and could not thus be annihilated, can be demonstrated from the cases decided by our own courts.

Before proceeding further, I ought to remark that the right of revocation is only claimed by the defendants' counsel on the ground that the constitutional prohibition has "no application to the exercise of police powers," which he asserts the revocation of the license to be. It is not pretended that the plaintiff has been deprived of his property by "due process of law," unless this law can be upheld upon the principle mentioned, and therefore the sphere of examination necessary to the determination of the case, is very greatly restricted. It will only be material, then, to inquire whether the license was a contract within the provisions of the federal constitution, or property within that of the constitution of our state; and the cases which I now cite are referred to simply to establish the proposition that a license is such a contract, and that rights acquired under it become "vested rights."

In the case of *Wood* agt. *The City of Brooklyn*, before cited, Justice Strong, speaking of a license to sell liquor which had been granted to the plaintiff in that suit, under the state law, says: "For this the law required him to pay, and he no doubt has paid a compensation to the city, and he has a vested right to the privileges which it confers so long as it remains in force. But by the decision of the court of appeals in the case of *The Mayor* agt. *The Second Avenue R. R. Co.* (32 *N. Y. Rep.* p. 261), reviewing and affirming the decision of the general term of the supreme court in this district, this point has, in my judgment, been passed upon and settled, and settled so as, so far as I am concerned, to be conclusively adjudicated, unless and until the court of last resort shall see fit to reconsider its opinion. In that case it appeared that the common council of the city of New York had authorized the construction of a railroad track in certain streets of the

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embraced in the act which is not expressed in its title, that does not render the act void ; it is still valid as to the subject that is expressed therein. (*The Town of Fishkill* agt. *The Fishkill and Beekmantown Plankroad Company*, 22 Barb. Rep. 634 ; *The People* agt. *The Same*, 27 Id. p. 445, &c. ; *The People* agt. *McCann*, 16 N. Y. Rep. p. 58, &c. ; *Williams* agt. *The People*, 24 Id. p. 405, &c. ; *The People* agt. *Lawrence*, 36 Barb. p. 184, &c.)

Second. It is claimed that the third section of the act divests the owner of his property without due compensation. Such is not the effect of its provisions. So far as relates to the sale of liquors specified therein, it is substantially the

city, and the running of cars upon it. The resolution authorizing the grant required, that before the permission should take effect, the grantees should enter into an agreement with the mayor, etc., "to abide by and perform the stipulations and provisions therein contained, and also all such other regulations or ordinances, as may be passed by the common council relating to said railroad." The suit was brought to recover penalties for running the cars without paying the annual license fee which an ordinance subsequently passed, require should be paid for every passenger railroad car. Opinions that the license fee could not be exacted, were delivered by Justices CLERKE and SUTHERLAND, of the supreme court. (See 21 How. 257.) The opinion of Judge SUTHERLAND is so clear and explicit, and contains language so much more apposite to the present case than I could select, that I shall quote several of its passages. He starts by saying : "I look upon the questions raised by the demurrer in this case as a question of property, of vested rights, resting on or secured by grant or contract." So in the present case, the license is property—a vested right—and as Judge SUTHERLAND said in that case, citing *Dartmouth College* agt. *Woodward* (11 Wheat. 511), "It as much within the protection of the constitution as any other property or right resting on or derived from contract."

Again, the judge says : "No doubt the city corporation has power to impose a license fee for the use of public carriages, but he concludes, that "after having licensed a public carriage for a certain fee, for a certain term, or for a certain term without the payment of any fee, it has no right during the term to impose the condition of the payment of an additional license fee in the former case, or of any fee in the latter. A similar question was presented in the case of the mayor, etc., against the Third Avenue Railroad Company in the court of appeals, and a like disposition was made of it, opinions being declared by Judges PARKER and CAMPBELL. That case was decided in September term, 1865. Now it is manifest that those declarations could only have been made on the theory that the license, or permission, or resolution, whatever it was termed, was a contract which could not be impaired. Other cases might be cited. Does the present differ in principle from those cases ? Not at all. Did not the state, then, make a contract with the plaintiff ?

The legislature created commissioners of excise—it authorized them to grant licenses for certain periods upon payment of certain sums of money ; and in pursuance of that authority, the state, through its thus created agents, for a valu-

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same as the old excise law, and is merely a regulation of such sale, and it is entirely different from the prohibitory law entitled "an act for the prevention of intemperance, pauperism and crime," which was declared to be unconstitutional in the cases of *Wynehamer* agt. *The People* and *The People* agt. *Toynbee* (3 *Kernan*, p. 378, &c). It must be deemed as a settled law that it is competent for the legislature to regulate the sale and disposition of spirituous liquors. That principle was fully recognized by the court of appeals in the two cases last cited, and cannot now be questioned.

Third. It is insisted that certain provisions of the law regulating the conduct of persons having licenses, and giv-

able consideration, conferred upon the plaintiff the right to sell liquor for a definite period.

Is it possible to conceive of any reason why that should be less binding than a deed of land, executed by the proper officers of the state, would be? or why the legislature should or could have the power to annul the one and not the other? Whether you call it a grant, a contract or a license, is immaterial. The faith of the state, for a valuable consideration, was pledged to the plaintiff, that he might carry on a certain business for a fixed time, and he can no more be deprived of that right than he could be of land which the state might have granted to him in fee. The constitution of the country prevents it, and common honesty forbids it. The use of it, as well as of land granted by the state, might be regulated; but under pretense of regulation, all use of either species of property could not be prevented. But all use of the plaintiff's license is prevented. The license itself is annulled. There is nothing inconsistent with these views in any of the cases in our own state relied upon by the defendants. They were all cases where the grant remained unrevoked, the use only being regulated. As, for instance, in the oft-cited case of *The Brick Church* agt. *The Mayor* 5 (*Cowen*, 538), where the city prohibited premises it had conveyed to the plaintiffs from being used any longer as a cemetery. That was a legitimate exercise of police power. But it is very different here. The plaintiff, under the law purporting to regulate the sale of liquor, has, without compensation, been absolutely deprived of property for which he paid the state a valuable consideration.

The injustice of any other principle than that which I have thus maintained will become yet more palpable, when it is remembered that if the legislature could destroy the unexpired term of the plaintiff's license when it had but sixty days to run, it might equally do so one day after it was granted, and without returning a dollar of the consideration which he had paid. And if the legislature may thus to-day deprive the plaintiff of one species of property, it may to-morrow in similar manner deprive other citizens of another species. There would be no limit to its destructive power. A doctrine which might lead to results, or support conduct so unfair and so dangerous to all our citizens, should not be sustained, unless upon the most explicit adjudications of courts whose authority is binding and conclusive.

Upon the grounds which I have thus stated, without elaborating them further, or assigning other reasons which also convince my mind of its invalidity, I feel

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ing the power of arrest to public officers, and to close and keep closed any place in which there shall have been any violation of the act, are unconstitutional, and that the entire act is therefore void. I do not deem it necessary or proper to consider or express any opinion on these questions. Those provisions are distinct and have no necessary connection with that under which the question is raised by the return in this case. It is well settled that a law invalid in some of its provisions may, nevertheless, be valid, and enforced as to the residue. The rule on that question is well stated by Judge SELDEN in the case of *The People* agt. *Toynbee* (3 *Kernan*, p. 441). He there says: "The general rule on this

constrained to declare the act of April 14th, 1866, unconstitutional and wholly void; and therefore the motion to continue the injunction must be granted.

JEREMIAH DRISCOLL agt. JACKSON S. SCHULTZ and others.

CARDOZO, J. I do not intend, at present, to add anything to the reasons which I assigned in the *Holt* case to establish the invalidity of the act of April 14, 1866. That question was rightly decided on the argument, and must be regarded as *res adjudicata* until it is presented to the general term; and then it will not be difficult to show that the little in the shape of *legal* argument, which, however, irregularly and improperly, has been attempted to be advanced against it, is unsound and fallacious, alike in law and morals. That decision effectually disposes of the present case, for the following reasons: The complaint here charges that the defendants, under pretence of an alleged statute which in legal effect has been declared to have no existence, are interfering with the business of the plaintiffs; and the affidavits read in opposition to the motion show this to be the fact. It is not claimed that aught appears upon the face of the complaint to show, as the defendants assert, that there is anything unlawful in the plaintiffs' occupation; and the defendants acting under a pretended statute, which has been pronounced unconstitutional and void, are mere trespassers, and cannot be heard to question the legitimacy of the plaintiff's business, or his right to carry it on. The doctrine is too familiar to every lawyer to require the citation of an authority. The motion to continue the injunction must be granted, with \$10 costs. If the phraseology of the injunction should need amendment, so as to make its effect—which by practical construction has been shown not to have been misunderstood—more clear and explicit, of course that may be allowed.

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subject is, that where a part of a law is in conflict with the constitution, and that part is entirely separable from the residue, so that the other portion of the law can be enforced without any reference to it, there the unconstitutional part only will be condemned; and it was said by the court in *Commonwealth agt. Ketchings* (5 Gray's Report. p. 486), that "the constitutional and the unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution in sections is purely artificial, but whether they are essentially inseparable and

NEW YORK GENERAL SESSIONS.

THE PEOPLE OF THE STATE OF NEW YORK agt. GEORGE KRUSHAW and six other persons, indicted for violations of law of April 14, 1866, commonly known as the "Excise Law."

DEMURRER to indictments.

A. OAKLEY HALL, *District Attorney*,
CHARLES TRACY and GEORGE BLISS, JR., *for People*.
JAMES T. BRADY, *for prisoners*.

HACKETT, Recorder. *The People, &c. agt. George Krushaw and six others indicted under various provisions of the excise act of 1866*: In these various cases demurrers have been interposed, upon the ground that the conceded facts constitute no cause for criminal action, and that the law under which the indictments were framed and found is unconstitutional. The indictments charge four generic offenses, which are distributed as follows: A count for selling liquors without holding the excise license of 1866; another count for giving away liquor; again for keeping and disposing of the same publicly; for similar acts especially committed upon a Sunday; for neglect to keep liquor shops "completely and effectually closed" on Sunday; and still another count for such neglect between midnight and sunrise of each intervening day and night. In these various indictments it is charged that the acts complained of were each and all committed unlawfully and maliciously; the ordinary statutory words do not appear, such as giving away liquors with intent to evade sale; publicly keeping liquors with intent to sell the same, or disposing of the same with intent to evade the law. In an act so novel in its features, the attorney for the people has, perhaps properly, in pleading, followed the language of the act in question, charging the offenses created by it. The excise law under consideration makes each and every act charged and counted upon a misdemeanor, and upon conviction the offender to be punished by imprisonment in the penitentiary. It further punishes by pecuniary penalties, and instigates diligence to the suppression of violators of the law, by an award of premiums to the informers of such violations. It becomes a misdemeanor to, *first*, sell liquor; *second*, to give it away; *third*, to publicly keep it; *fourth*, to dispose of it, without the seller, giver away, keeper or disposer, holding the especial license of the act of

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connected in substance. The only question raised by the return is, whether the sale by De Vaucene of ardent and spirituous liquors mentioned therein without a license granted by the commissioners of the metropolitan board of health, subjected him to arrest and imprisonment upon the complaint made on oath against him. Such sale is in express terms prohibited by the act, and is declared to be an offense punishable by fine or imprisonment, or both. The act constitutes this a distinct and separate offense, having no connection with any other, and if the views above expressed are correct, it follows that De Vaucene was properly held in custody under such complaint, and that he was not impro-

1866. In addition, offenders are liable to have their "places" entered by sheriffs and police officers without process of any kind, simply upon their own action, their own discretion, and to summarily close and keep closed all such places for an indefinite term. In overruling the demurrers now interposed, one duty would alone remain to the court, which would be to sentence the defendants, under the law, for a misdemeanor, and to the penitentiary. In misdemeanors there is no *respondeat ouster* after demurrer (*People agt. Taylor*, 3 Denio, p. 9). On the other hand, if the demurrers are sustained for either of the various causes assigned by the counsel for the defendants, the decision of this court should be respected by the various magistrates and peace officers until reversed by a higher and appellate court. The question submitted is one of great importance both to the defendants, whose liberty is directly imperiled, and to the people, whose representatives framed the act. The indictments are founded upon alleged violations of the late excise act, and they must stand or fall upon the judicial decision to be rendered upon its legality or unconstitutionality. It was not indictable at common law to keep an inn or alehouse, unless disorderly conduct was commonly permitted therein (*Overseers agt. Warner*, 3 Hill, 150). Statutes for regulating the sale of intoxicating liquors have existed since the reign of Edward II., and commenting upon them, Bishop, in his treatise, takes occasion to write: "Whoever takes the trouble to read the old statutes of England on this subject learns, from rescitations of facts therein made, that the enforcement of this class of laws was always difficult." I have been unable to find in my researches that in Great Britain statutes regulating the liquor traffic, have ever contained any of the express or implied prohibitions against sales or the giving away of liquor, which have been incorporated in some of the states of the union, and even in Great Britain (where the church in harmony with the sovereign power might seem disposed to blend remedial laws with ethical notions), I am yet to learn, has gone to the extent of classifying the giving away of liquor as a crime. The act in question is so new and peculiar in its main features, that in giving my opinion upon the points involved and the conclusions to which I have arrived, I deem it necessary to quote some of its enactments. And, first, I would note a decided and remarkable innovation upon the license economy which has hitherto marked the legislative action of our state, which has authorized local authorities to select and appoint their own excise board. The new act makes an excise district created out of a metropolitan police district, but within the latter, and omitting therefrom Westchester county. By

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perly detained and restrained of his liberty, and consequently that he is not entitled to a discharge. He must, therefore, be remanded, and all further proceedings in the court be discontinued.

In re John H. Ketchum—GILBERT, J. The return to the writ of *habeas corpus* shows that the petitioner is held under a warrant of arrest issued by the justice upon the sworn complaint of a policeman, that on the 7th of July instant, in the city of Brooklyn, in the county of Kings, the petitioner did unlawfully and publicly keep, sell and dispose of a quantity of strong and spirituous liquors—to wit: a glass of gin, at his place of business, No. 12 Fulton street, contrary to the

the terms of section 1, the sellers and givers away of liquor in the counties of Richmond and Queens, are supervised in their character and business by excise commissioners, who are not only appointed by centralized power at the seat of government, but one or more of whom are not even residents of one of the counties in which he or they exercise authority. The license fee of the dealers in liquor within the excise counties are not made applicable to the benefit of the fund belonging to those counties, but materially subserve to lighten the burdens of taxation of the neighboring counties of Kings and New York (§ 23). In the excise district the commissioners are charged with certain duties (§ 1). In the metropolitan police district an inspector of excise has jurisdiction (§ 2). As the boundaries of the several districts differ, it follows from the letter of these two sections that the subordinate inspector has powers of jurisdiction which his superiors have not been invested with. His duties are such as may, from time to time be delegated to him by the commissioners. The title of the act relates to the district in which the inspector acts. The bulk of the sections affect the lesser or smaller district. By the terms of the act, certain omissions and commissions are offenses at low water mark on the Westchester shore of the Harlem river, and cease to be criminal at high water mark. The act divides persons who sell or give away liquor into two classes; the one who sells or gives away to the extent of five gallons or in excess; the other in quantities less than five gallons (§ 7). The first class are not permitted to sell or give away unless "licensed" and "permitted" (§ 3). Both classes are prohibited from selling on credit (§ 17). The lawful sales are now fettered by this provision just as unlicensed (and therefore unlawful) sales of liquor have hitherto been. In acting upon applications for license the excise commissioners have delegated to them the legislative power of fixing a license fee, to range between thirty and two hundred and fifty dollars. The counsel for the people upon the argument stated that the board of excise had made two distinct licenses and two distinct amounts. The license is only to be given to those alone who may be approved by the board for good moral character. The act does not furnish any mode by which the conscience of the board may be satisfied that evidence as to the requisites of character are sufficient, although in former excise acts, certificates of character from residents and others within the ward or assembly district, have been regarded as sufficient. Upon the argument nothing was said as to the mode by which the board practically acquainted itself with the subject of character; but it is only fair to

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provisions of the third and eighth sections of the act to regulate the sale of intoxicating liquors, &c., passed April 14, 1866. The discharge of the petitioner is demanded on the ground that the statute in question is unconstitutional and void.

1. It is said that the statute does not conform to section 16 of article 3 of the constitution, which requires the subject of a local bill to be expressed in the title. I think this objection has no basis in fact (*People agt. Liederman*, 36 Barb. 177). Besides, the article is not a local one within the meaning of the constitution.

2. The counsel for the petitioner admitted, as all must

presume that it would seek for legal testimony upon that subject rather than resort to the testimony of officers whose duty was simply to enforce the act. This license, when obtained, is to be hung up in the room or place where sales are made. It authorizes the holder to sell and dispose of—not sell or dispose of—the beverages named in the act and in the license only at such room or place. Both persons and premises are the subjects to be licensed. The license is also to be exhibited at all times to peace officers who demand its production. Not to do so, by the terms of the act, is to furnish evidence adverse to the legal status of such persons so declining or refusing. There is no mode provided for licensing the giving away or publicly keeping similar beverages, although to do so is made as much a misdemeanor when not licensed as to sell or dispose of when unlicensed (§ 31). Those licensed under this act are to prevent breaches of the peace in their places, and when their quietude is invaded are commanded, under penalty of being adjudged guilty of a misdemeanor, to forthwith remove all persons, the orderly as well as the disorderly—perhaps their assistants and themselves—from within doors, and close their places and keep them closed (§ 10). Licensed persons (except substantially those who keep hotels) are enjoined to keep their licensed places “completely and effectually closed on Sundays, and between midnight and sunrise in every twenty-four hours (§ 14). The license thus granted may be revoked, cancelled and annulled by the board “if it shall become satisfied that the licensed persons have violated any of the provisions of this act” (§ 22). The whole act bears marks of hasty consideration. There are many serious considerations which have arisen upon the arguments which demand attention without entering into the decision. Counsel for the people urged that conflicts between the constitution and the statutes ought not to be lightly countenanced. Surely this should be so where a forced construction of the constitution is urged against the natural equity and letter of the statute. The counsel for the accused, however, claim that the very letter of the bill of rights of the federal constitution is opposed by this excise act. The learned district attorney urged that “courts at *nisi prius* are in practice both to hear or treat constitutional questions, forcing the litigant to moot them in *banco* and the higher tribunals.” But the reason assigned fails here, because the people enjoy, by these demurrers, as full benefits upon findings of fact as if convictions had been had before petit juries. The questions are not upon motions to quash, from which no appeal lies. The interposition of demurrers are now rarely used, and would seem to show, on the present occasion, the confidence of the

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admit, that the prohibition against selling strong or spirituous liquors, in quantities less than five gallons at a time, without a license, is valid, but he contended that the whole statute rested on section three, which contains this prohibition, and that because that section contains other and distinct prohibitions, which the legislature had not the power to impose, the whole statute is void. I cannot assent to this proposition. It is unsound in logic as well as in law. The third section of the act in question provides that no person shall publicly keep or sell, give away or dispose of, any strong or spirituous liquors, &c., without a license, and makes every violation of it a misdemeanor. The petitioner

counsel for the defense in the position he has assumed. It was urged that there was a variance between the title and the body of the act, but I do not consider that technical question, as my decision is placed upon the broadest grounds of substance. It was argued that the act was a local one, and that many subject matters embraced therein went beyond the expressive title, "to regulate sale." The "query" of the court of appeals in the case of *The People* agt. *Williams* (24 N. Y. R. p. 405), certainly goes far towards qualifying what the court had previously said in *The People* agt. *McCann* (16 N. Y. R. 58). But with the conclusions hereafter undoubtingly arrived at, a conclusion upon the above point may be waived under the conflict of decisions. Connected with this point of locality another and vital question arises: How far can the legislature constitutionally oblige a county of the state to contribute to the revenues of another without the state at large, or the county so taxed, enjoying a correspondent concurrent benefit? The residents, certainly, of the county towns of Kings and Queens, and perhaps of Richmond county, by this act are forced to contribute not to the revenues of the state, nor of their own respective counties. One of the most vital questions which has arisen upon the argument is, how far can the legislature create crimes not general throughout the state, but geographical crimes; crimes defined and limited within certain districts, and only affecting certain counties within the state, and of a higher grade than mere police infractions? Can it make an act a crime in one county, city or town, and not in another county, city or town, adjacent, upon grounds not peculiar to the particular customs, usages or chartered restrictions of such locality? If such be its constitutional power, where is the limit to legislative caprice? Can it make the stealing of \$26 grand larceny in Kings county, \$30 grand larceny in Erie county, and 6d. grand larceny in Oneida county? Can it apportion manslaughter by degrees throughout the different counties in the state? In the case of *The People* agt. *Williams*, above referred to, the point was raised and argued upon a local statute making the picking of pockets in New York a different crime from its legal definition in all other parts of the state. The decision was given upon other points in favor of the counsel for the accused; but it may be remarked that at the succeeding session of the legislature it destroyed the topographical character of the crime adverted to, and made its legal definition and penalty general throughout the state. No lawyer should doubt the inexpediency of the legislature enacting laws of a criminal nature which should not in their operation be concurrent through-

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is charged with selling a glass of gin without a license. The power of the legislature to create this offense, and to punish it in the mode prescribed, is unquestionable. It was indeed said, on the argument, that the right of disposition of liquor on hand at the time of the passage of the act was absolute, and that the legislature had no power to impair this right by requiring a license to be taken out as a condition of selling it in quantities less than five gallons. But this proposition was not proved, and it needs no argument to prove that it has no foundation in law. It being understood then, that the act with which the petitioner is charged is a legal offense and punishable as such; the precise question presented is

out the state. Is not the very essence of a criminal law its general application? Can the principle of territorially apportioning crime be sanctioned without ultimately allowing a legislature to enact criminal laws, applicable to some obnoxious person or persons, sect or sects? The authorities bearing upon this point are *Duarris on Statutes* (p. 480); *Hatch agt. Vermont P. R. Co.* (2 Vermont, 48-61); *Benson agt. Mayor* (10 Barb. 245); *People agt. Draper* (15 N. Y. 544); *Calden agt. Ball* (3 Dallas, 386). It was argued that the act was unconstitutional, because excise commissioners are and always have been county or local officers, and that this act does not provide for the election or selection, but names them. It would seem that this point is not favored by the court of appeals in the fire department case. The counsel for the people, both the district attorney and the counsel for the excise commissioners, admitted upon the argument that unless this act was regulatory, and was in any of its provisions prohibitory or confiscatory of property, or necessarily subjected the accused to deprivation of his liberty or property without due process of law, then it would be within the decision of the case of *The People agt. Wynehamer*, which decided the liquor law of 1855 to be unconstitutional. Let us then test this case by this concession and inquire: *First*. Is the act in question as presented to this court prohibitory? *Second*. Is it confiscatory? *Third*. Is it, when enforcing remedies, in conflict with the bill of rights? It will be conceded that implied prohibition, implied confiscation and implied conflict may become as effectual as express prohibition, express confiscation and express conflict. Such express conflict has been adjudicated upon in *Consa agt. Albro* (1 Gray Mass. R. p. 9), and *Tynbee and Wynehamer* cases. The act in question being highly penal in its character, involving upon conviction penal servitude, must be strictly construed. In the latest points submitted to me by the counsel for the excise board, it is said that penal statutes are not to be so construed as to defeat the manifest intention of the legislature; but that intent should be constitutionally conceived and expressed. One of the defendants stands indicted for giving away liquor without being licensed. Section 3, in connection with sections 16 and 19, undoubtedly make this act a misdemeanor, punishable by fine, imprisonment, penalty and arbitrarily closing up of any place within which such act should occur. It is somewhat remarkable that the statute omits to provide a license for giving away liquor; and the same may be said of the prohibition against keeping it publicly. The words "sale" and "disposing of," are convertible terms; but the phrases "giving away" and "publicly keeping," are not con-

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whether the circumstances that the legislature incorporated in the same act other and distinct provisions which they had no power to enact, vitiate the whole statute. No authority for this proposition was cited except the case of *Wynehamer*, in 13 N. Y. R. On looking at that case I find that, so far as it contains any allusion to this subject, it is an authority for the reverse proposition. The rule contended for would be repugnant to reason and common sense, and I am satisfied no such rule has been or ought to be established. Mr. Sedgwick, in his treatise on statutory and constitutional law, says: "The principle that a statute is void only so far as its provisions are repugnant to the constitution, that all provi-

vertible or synonymous with "sale and disposition." Section 4 takes the seller out of the operation of the misdemeanor clauses by offering him the opportunity of a permit. No portion of the law exempts him who publicly keeps liquors or desires to give them away, from the operation of the misdemeanor clauses, of their stringent remedies and of their punishments. The law makes it a misdemeanor to give away or publicly keep liquor without a license. What is this but practical prohibition? It is true that save in the county of Westchester and in all other parts of the subdivided police district, any person not licensed may keep, sell and dispose of five gallons at a time of strong and spirituous liquors, wines, ale and beer; but what is the operation of this law upon any person who may have had in his possession at the time that the law went into effect, a lesser amount of the beverages mentioned? Does not the provisions of the law referred to practically destroy or confiscate such property? The law makes it a misdemeanor to give away or publicly keep liquor, &c., without a license, and omits to provide one. Thus the law does not in terms forfeit or expressly destroy the wine or beer of the citizen as the law of 1855 aimed to do, nor seize them by undue process of law, but by making it penal to simply keep them and give them away, this act as effectually in the end destroys its value and character of property and takes it away from its owner without compensation. If this excise act be valid, every person who gives his guest a glass of wine commits a misdemeanor, and so does every apothecary who keeps a jar of alcohol. The excise acts of other states are not obnoxious to this criticism, for they severally in their several excise acts have added words of intent, such as—with intent to sell, or with intent, under the guise of a gift, to effect a sale, as in the striped pig illustration cited by the counsel for the excise board. Even the odious law of 1855 expressly excepted a dwelling house as the scene of gift or keeping, which the act in question does not. Others are indicted for not "effectually and completely closing" their places. Where is the constitutional power to make such an enactment? A man's house has always been regarded as his "castle." So long as he does not commit crime in it or disorder, may he not keep it open as long as he pleases and at all hours? Concede that the legislature may regulate the hours of sale, yet wherein consists the crime of keeping one's premises open to public view, or private ingress or egress? Many storekeepers in every walk of life, live in rooms adjoining their shops. Some have no entrances to the abodes of their families except through their shops or stores, where poverty or the desire of thrift compels or induces

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sions may thus be void, and this not affect other provisions of the statute, has been frequently declared" (*Sedgwick, Const. Law*, 489). "The principle is now well understood," says the supreme court of Massachusetts, "that when a statute has been passed, some part of which is not within the competency of the legislative power, such part thereof will be adjudged void, while all other parts of the act not obnoxious to the same objection will be held valid (*Fisher agt. McGee*, 1 *Gray*, 29). If it be admitted then, that the legislature has not the power to prohibit the publicly keeping or the giving away of liquors, or the selling to minors, &c., or to authorize the necessary enforcement of the law in

them to live. It is not enough to say the lawmakers did not intend such interpretation should be given to the act, and looking at it we find that it sternly provides that the places shall be completely and effectually closed, not for the purpose of preventing sales, but for all purposes, and, at the discretion and judgment of a police officer who has the right to effect the closing, to watch and maintain it. But the gravest constitutional objections attach to sections 19 and 20. Do they not on their face conflict with constitutional provisions? The bill of rights provides, article 5, "Nor shall any person be deprived of liberty without due process of law," nor shall private property be taken for public use without just compensation; * * * and by article 4: "The right of the people to be secure in their houses against unreasonable seizures shall not be violated." The excise act provides as follows, 19th and 20th sections:

SECTION 19. It shall be the duty of every sheriff, constable, policeman and officer of police to compel the observance and to prevent the violation of the foregoing provisions hereof; if necessary by summarily closing and keeping closed any places in which shall be violated any of such provisions.

SECTION 20. Every sheriff, constable, officer or member of police shall forthwith arrest all persons who shall violate any of the provisions of this act, and carry such persons before any magistrate of the city or town in which the offense shall be committed, to be dealt with according to the provisions of this act. And it shall be the duty of every magistrate to entertain complaints for a violation of any of the provisions of this act made by any person under oath.

Not only ministerial duties are here conferred upon peace officers, but judicial powers. They are to "compel the observance" of the law; when and how to compel, they judge. They decide upon the necessity. They act, by summarily closing. Summarily is a word excluding the ordinary processes. They are to keep the places closed. For how long? To keep the places closed "in which shall be violated any of such provisions," i. e. "the foregoing provisions hereof," that is to say those mandatory provisions of the act. In one place a man may have sold liquor to an apprentice or a child under only technical guilt. He is not only punished by imprisonment therefor, but the place is tainted by his crime, it seems, and is to be kept closed thereafter. The highest crime known to law is murder. Will some future legislature shut up the place for all time in which the murderer committed his crime, as a high cabinet officer closed the building in which an ever to be deplored assassination was committed? Crime is a personal

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the manner and by the means provided, it does not follow that it transcended its powers by making the sale of gin by the glass, without license, an offense punishable according to the ordinary forms of law. The question or the validity of the other provisions of the statute to which allusions have been made is not before me. While I have decided convictions respecting them, I do not for this reason think it proper to express them.

The petitioner must be remanded.

offense, to be visited by personal reprobation. When an offender is to be arrested under the provisions of this act, no warrant is necessary. Some skillful hand that framed the metropolitan police act, was careful to liken the power given by it to a peace officer to arrest without warrant under that act to the common law permit, viz: "Only when the offense was committed within the presence of such peace officer." But there is no such limitation in these sections. Under all other penal statutes, offenders even after they are arraigned before a magistrate, are to be dealt with according to the general provisions of the Revised Statutes. But the excise act says "to be dealt with according to the provisions of this act." Will any magistrate, after reading the entire act, say where are the provisions that will guide him to obey section 20? The most serious question now arises. Can these remedial and punitive sections be so separated from the rest of the law as that they may be declared void without injuring the body of the act? The counsel for the accused earnestly urges that to convict them is to necessarily subject them to the operation of these sections. Is it an answer for the people to urge that such sections may never be acted upon? Courts should not expose defendants upon charges of criminal offences to the liability of unconstitutional remedies. Since the argument commenced in the cases now at bar, writs of *habeas corpus* and *certiorari* have officially informed the court that the illegalities and what might almost be called the unusual punishment forbidden by the federal bill of rights are being practiced. Before the rebellion, such sections would have been deemed monstrous. "Military necessity" has made a portion of the people readily obedient to such strange, unusual and original exercise of despotic power, and has made other portions at least tolerant of it. Some legislators have been taught to pattern the statute book after the army regulations, and to make of judicial tribunals *quasi* court martials, and of civil peace officers, martinets. To the extent of my reading and information, not even in the New England liquor law, were there to be found such odious features. That law allowed a peace officer to enter a store and seize and destroy liquor; but it also permitted to the owner possession and control of the keys of his door afterwards! The counsel for the people have failed to take this excise act out of the reasoning and force of the decision of the court of appeals of this state in the case of *Wynehamer*, which distinctly held that any law upon the traffic in liquor which necessarily, either by express or implied prohibition, destroyed the quality of property (and which case distinctly recognized liquor as property), or deprived the citizen of his legal procedure in defending that property, was unconstitutional and void. In conclusion I sustain the demurrers, because I believe that the act in question, the excise act of 1866, violates the bill of rights by depriving within the instances before mentioned, the citizen of his liberties, by seizing his property without due process of

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SUPREME COURT.

JULIA A. WYMAN agt. WILLIAM H. SMEAD and others.

The opinion of the majority of the court in this case is published in this *Vol. ante*, p. 1. The following dissenting opinion of Judge MILLER has been received since the opinion of the court was published, and is given below.

*Albany General Term December, 1863.**Before HOGBOOM, PECKHAM and MILLER, justices.*

MILLER, J., *dissenting*. I am constrained to differ from the opinion of Mr. Justice PECKHAM, in favor of granting a new trial in this case. I agree, however, with him that the

law, by virtual prohibition preventing his dealings with his own property, and without due forms of law, or without providing due opportunity for trial, or being heard upon the seizure of his property. And furthermore, by impliedly confiscating the same as a punishment for happening in a critical moment to be its possessor. If there are any other like indictments of records, the same decision may be entered upon motion.

The district attorney then said: Of course it is my duty to proceed under the act. Therefore, in the discharge of my official duty I have noticed all the parties who were under indictment, in accordance with that act, to respond in court, and as is usual, to plead to the indictment that had been found. The first day of the term is usually assigned for pleading; and I am given to understand by several counsel here that the court room is quite crowded with those defendants; and therefore, to relieve the court and enable it to proceed with its business, it is but fair and just that I should say that so long as the decision of this court has been upset, I shall not, out of respect to the court, call upon any of the defendants in like cases to plead. And, therefore, if your honor desires to look into this question (perhaps you have already done so), I can adjourn these cases for some time, or I can adjourn them for the term.

Judge RUSSELL—I do not desire to look into these cases. I have examined the act. Therefore, so far as the decision of the recorder is concerned, that will be controlling. I shall not take any action in the matter until after the decision of the supreme court.

The District Attorney—I had an interview with one of the judges of the supreme court upon some other business, and was informed that there would be no general term till November. I may therefore announce to the counsel present that they may discharge their clients.

Judge RUSSELL—I think it better to lay over the whole of these cases until after the decision of the supreme court.

The district attorney then announced that he would not take up these cases to-day.

Mr. McKeon moved that the indictment against his client be quashed.

The court declined to entertain the motion.

Mr. Spencer moved that his client be discharged on his own recognizance.

This the court also refused to grant, and expressed the conclusion to take no

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disposition of the case must depend upon the question whether it is within the principle laid down in *Bush* agt. *Lathrop* (22 N. Y. 535), which is relied upon to sustain the position taken by the defendant's counsel. In the case referred to, a bond and mortgage for \$1,400 was assigned as security for the payment of a note of \$268.20. The assignee at the time gave back a receipt acknowledging the assignment to him, and agreeing to return the same upon the payment of the note. The assignment was written upon the back of the mortgage, and expressed a consideration of \$268.20, and contained a covenant that \$1,400 was due on the bond and mortgage.

By the terms of the arrangement the bond and mortgage were to be returned upon payment of the note, and the assignment itself expressing a consideration for less than the amount of the mortgage, was a notification to persons purchasing the bond and mortgage, sufficient to put them

action in the matter until after the decision of the court of appeals, but shall consider the decision of the recorder as controlling.

Mr. McKeon—I ask, if your honor please, that these men be discharged. The police have gone on arresting them notwithstanding the decision in another court that this law is clearly unconstitutional. I ask the district attorney to say that under the decision of this court, these men cannot possibly be held for one minute.

The District Attorney—I have already stated that so long as this decision is controlling, I shall not move any of these cases.

Mr. McKeon—Men are here under an unconstitutional act, not worth the paper upon which it is written, and I ask that they may be discharged.

The District Attorney—I am not counsel for these men, and therefore the counsel should ask to have them discharged on Saturday, which is the regular motion day.

The Court—A motion can be made on the day of trial, or on Saturday.

This matter was then closed, and the court proceeded to other business.

THE EXCISE LAW IN THE COURTS—A TEST CASE AS TO THE UNLICENSED DEALERS—JUDGE CLERKE REGARDS THE NEW EXCISE LAW CONSTITUTIONAL.

The test case in conformity with the suggestions made on Friday by Judge CARDOZO, in the court of common pleas, came up in that court yesterday. The case selected was that of *Jeremiah Driscoll* agt. *Jackson S. Shultz*, to test the question of the application of Judge CARDOZO's decision to those who have not taken out a license under the act. This was a motion to continue an injunction heretofore granted, forbidding the defendants from interfering with the plaintiff in his busi-

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on their guard so as to ascertain the actual conditions upon which it was made.

The title was transferred upon this condition, by a written agreement entered into between the parties, and a subsequent absolute assignment by the assignee could not transfer any other or greater right than he had acquired at the time.

I think there is a distinction between that case where a written agreement accompanied the assignment, to return the mortgage upon payment of the note, and the present one, where a bond and mortgage and a promissory note was left as collateral to a distinct and separate contract for the sale of land by third parties, and subsequently given up, and the bond and mortgage now in suit in part put in their place, without any special arrangement between the mortgagee and the assignee, and with no condition attached to its transfer, except what was contained in the contract for the sale of the lands between Livingston and Smead and Alexander. Even in this contract between third parties, there was no

ness as a liquor seller at No. 33 Oak street. The motion was made on the complaint which alleged that plaintiff was a liquor seller, that the defendants have interfered with him, arrested him, seized and taken possession of his premises and property, and deprived him of his rights, and threaten to continue to repeat and will repeat these acts, and by so doing will inflict an irreparable injury upon the plaintiff, and that an action for damages will be an inadequate remedy.

The affidavits of defendants aver that plaintiff has no license to sell liquor under any law; that his place is a mere liquor shop, not an inn; that at that place he has for some time past sold, and did sell on Sunday last, liquors in small quantities; that such sales were not made to travelers, but to neighbors; that the defendants have not seized and taken possession of his premises or property; that all that was done was to arrest the barkeeper, and when he refused to close the place he was taken to the station house, and subsequently the place being found open, it was closed by the police, as is always done in such cases. The defendants also deny that they have ever ordered plaintiff's place to be closed, or that they will do so, and annex an order of the defendant Kennedy, directing the police not to close places unless there is a disturbance. They also aver that they are responsible, and in general deny the plaintiff's allegation as to wrongs inflicted upon him.

Judge CARDOZO reserved his decision.

Judge CLERKE, in the supreme court chambers, yesterday, refused an injunction against the board of exise, the commissioners of police and others, of a similar character to those already granted in the court of common pleas. Justice CLERKE stated that from such cursory examination as he had made of the law, it seemed to him to be constitutional, and he should not, therefore, at present, grant an injunction; though he would, of course, give an order to show cause, if required, but without any injunction in the meantime.

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express condition attached to it requiring that the bond and mortgage should be re-assigned or surrendered to the assignee.

In the case under consideration, we are required to go further than in *Bush agt. Lathrop*, and protect the interest of third parties, the mortgagor, which is entirely disconnected with the assignee of the bond and mortgage.

The assignment was made by the mortgagee, who is not a party to this suit, and so far as he is concerned was absolute and without any condition whatever. He claims no protection, but the mortgagor and Gidney, Livingston's assignee of the contract between Livingston and Smead and Alexander, ask the court to recognize equities existing under a separate and distinct contract for the sale of the land. No case has ever gone to this extent, and I am not prepared to extend the doctrine laid down in the case referred to, which was only sustained by a bare majority of the court of appeals.

The rule relied upon by the defendants does not, as I understand, apply to all cases of assignment of bonds and mortgages. Judge DENIO in his opinion in 22 N. Y. (p. 549), says: "It is not necessary to add that I do not consider that the assignee stands in the place of the assignor, in every respect in all cases. The suggestions made in the earliest of the cases in this state, that the assignee, if a *bona fide* purchaser without notice, was not prejudiced by the notice of his assignor, was well founded, and has since been separately recognized" (citing several authorities). He also says that it was not the notice that prejudiced the title of the party under which the defendant claimed, but the fact that the *owner* of the bond and mortgage were parties with it, except upon condition that it should be returned to him on payment of a comparatively small sum of money, and it was under that conditional agreement that the defendant claimed, and though he may not have been aware of the condition, he was nevertheless bound by it.

In the case at bar there was no condition annexed to the assignment itself, or made in immediate connection with it.

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The owner absolutely parted with his title. There was no agreement that it should be returned to him: He had no rights reserved upon any condition.

The arrangement entered into was in the contract made between Livingston and Smead and Alexander, for the sale of the real estate, which was afterwards changed by a verbal agreement, substituting other security, and in part the bond and mortgage in question in the place of what was then provided for. The assignment, on its face, was for the full amount, and absolute and complete, with nothing connected with it to call for the exercise of an extraordinary degree of vigilance and caution. The plaintiff had no notice that it was collateral or conditional, nor for anything that appears had she any reason to suppose or believe that any of the prior assignments which were fair upon their face, and had been recorded, were subject to any condition but that which they contained. She had notice to the contrary by the assignment to Livingston and the subsequent assignments which were on their face unconditional.

The case cited is one where the equity grows out of the transaction itself; that is, the assignment of the bond and mortgage. There it is a latent equity, with which Loche, the mortgagee and the original assignor was not connected—an equity of a third party outside and independent of the rights of the mortgagee, which no reported case has ever held to be protected, and which does not come within the principle decided to be applicable to the parties to the assignment, the assignor and assignee.

If I am correct in the views which I have expressed, the question of good faith, upon which some stress is laid, can scarcely be said to arise in the transfer of the bond and mortgage. If it does however, there is no pretence that the plaintiff was not a *bona fide* purchaser. The assignment shows that she was. It expresses a full consideration, and in the absence of any circumstances to impugn the *bona fides* of the transaction, every presumption is in favor of its fairness. In the case of *Bush agt. Lathrop*, before cited, Judge DENIO, discusses the question whether the defend-

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ant was a *bona fide* purchaser, and says it appeared that a debt of fourteen hundred dollars well secured by a mortgage on real estate was sold for one-fifth of that sum. That was enough to put a person upon inquiry. He also expresses the opinion, that if upon making reasonable inquiries, although the assignment was conditional, he had been led to believe that the purchase was absolute, he would have been entitled to the character of a *bona fide* purchaser; and as he was a witness on his own behalf, and might have sworn that he had no notice of the condition, he ought to have denied notice, whether inquired of by the plaintiff or not. No such rule can apply to a case where the assignment on its face purports a full consideration; where there is nothing in the case to indicate a want of good faith, and where the party himself was not sworn as a witness. *Prima facie* the assignments were fair and valid, and until impeached, I think the plaintiff was not called upon to rebut a presumption of bad faith not warranted by any of the facts in the case.

I am not prepared to assent to the rule laid down by the learned judge in his opinion, that the bond and mortgage belongs to Gidney, the assignee of the contract for the sale of the real estate. The assignment of the bond and mortgage was made by Livingston on the 7th of June, 1860. The assignment of the contract to Gidney was executed by Livingston on the 8th day of February, 1861, some time afterwards. As Livingston had parted with his title to the bond and mortgage, before the assignment to Gidney, he could not transfer what did not belong to him. He did not own it at the time, and hence the assignment could not carry with it, what he did not hold. So far then, as Gidney is concerned, he has no claim to the bond and mortgage.

In my opinion, a new trial should be denied, and the judgment affirmed with costs.

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SUPREME COURT.

S. M. BAIRD agt. JOHN G. PRIDMORE.

The objection that a *summons* issued from a justice's court is invalid by reason of the omission to affix thereto a *U. S. revenue stamp*, should be made before the justice on the *return day of the summons*. It is too late to raise that objection for the first time *on appeal*. After judgment, such an objection should not be listened to in any court.

It seems, that it was the intention of the U. S. revenue act, to impose a stamp duty of 50 cents upon all writs, summons and other original process by which a suit was commenced in any court of record, and also of the same amount upon any writ, process or summons in a *justice's court* or other court, not of record, for the recovery of any sum exceeding \$100.

The *constitutionality* of the internal revenue act is too clear for discussion.

Monroe General Term June, 1866.

Before WELLES, JOHNSON and E. D. SMITH, Justices.

THIS action was commenced before a justice of the peace, by service of a summons issued by the justice, and commanding the defendant to appear before said justice to answer the complaint of the plaintiff to his damage of two hundred dollars or under.

No revenue stamp, under the statute of the United States, was attached to said summons at any time. The defendant failed to appear before the justice, and the plaintiff recovered a judgment from which the defendant appealed to the county court of Livingston county, upon the ground that the summons issued by the justice was irregular and void by reason of being issued and served without a revenue stamp being attached thereto, which was the only question in the case; the county court affirmed the judgment and delivered the following opinion:

S. HUBBARD, County Judge. This action was commenced by summons issued by a justice of the peace, and which concludes as follows: "To answer S. M. Baird in a civil action to his damage of two hundred dollars or under." There is no other statement of claim in the summons.

The summons was not stamped.

It is claimed by appellant that it should have been stamped

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with a 50 cent internal revenue stamp, and for lack of such stamp it was void, and the judgment should be reversed.

The respondent claims :

First. That the law requiring the process of state courts to be stamped is unconstitutional.

Second. That the summons in this case is not within the requirements of the law.

The authorities on the question of unstamped process being void, are very nearly equal, and it might seem ostentatious for a county court to give an elaborate opinion determining the just weight of the respective authorities unless absolutely necessary. On a careful consideration of the whole matter, I do not think such necessity exists in this case. I will assume the law to be constitutional. The question then remains—does the law require a justice's summons to be stamped?

It is clear that the only process from a justice's court requiring to be stamped by the terms of the law, is a writ, in which the amount claimed is \$100 or over.

The question in this case then is—was this summons a writ claiming one hundred dollars or over?

But leaving out the latter clause was it a writ within the meaning of the law?

It is a little difficult to determine what is now in this state a true definition of a writ, but a common law definition, and which congress may well have had a view, requires a seal (*Bouvier's Law Dictionary, writ*). This summons neither had, nor required a seal. Nor did a justice's warrant require a seal at common law (42 *Barb.* 215); and was, therefore, not regarded as a writ. It might be under seal, and would then probably be a writ. If it requires a seal within the meaning of this law to constitute a writ, then of course this summons needed no stamp.

In courts of record "writs or other original process" require stamps. But in justice's court "other original process" do not require stamps. And "no writ, summons, or other process issued by a justice of the peace," except "a

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writ in which is claimed \$100 or over," is subject to stamp duties.

This summons did not require any statement of claim, and the respondent insists that it should not be interpreted to state any, but whatever may be its true interpretation, or whatever may be held to be a correct definition of writ, it can hardly be held that a justice's summons requires a stamp. Congress has clearly made a distinction between "writs," "summons and other original process," and in courts not of record has only taxed writs, while summons or other process issued by justices of the peace, except writs, are exempt. If we cannot tell precisely what they included in each class, we can yet see that they made the classes, and that they more probably included justice's summons in the class of "summons and other original process," than in the class of writs.

In this view the judgment should be affirmed.

From this decision the defendant appealed to this court.

BINGHAM & BRODHEAD, *attorneys, and*
A. M. BINGHAM, *counsel for appellant.*

First. Section 151 of the act of congress, approved June 30th, 1864, called the national tax law, provided: "That there should be levied and collected upon such instruments, written or printed, as were set forth in schedule 'B,' the several sums of money set down in figures, or otherwise specified in said schedule."

Section 158 "provided that any person who should make, sign or issue any such paper without having an adhesive stamp to denote the duty thereon, with intent to evade the provisions of this act, shall for every such offense forfeit the sum of two hundred dollars; and such document or paper shall be deemed invalid and of no effect."

Schedule "B" reads as follows:

1. "Writ or other original process by which any suit is commenced in any court of record, either of law or equity, 50 cents."

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2. "Where the amount claimed in a writ, issued by a court not of record, is one hundred dollars or over, 50 cents."

3. "Provided that no writ, summons or other process issued by and returnable to a justice of the peace, except as hereinbefore provided, &c., shall be subject to the payment of stamp duties.

The county court decided the case entirely upon the ground that the word writ, in the second clause of schedule "B," above quoted, must be construed to mean a process issued under the seal of the court, and did not apply to a summons which was not under seal.

Second. We do not understand the word writ in the section referred to, to possess any such limited meaning; because,

1. A process under the seal of the court is not the general definition of the word writ.

Bouvier defines the word writ to be, in its general meaning, "a mandatory precept, issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned" (*Bouvier's Law Dictionary*, vol. 2, 663).

A summons is defined to be "the name of a writ, commanding the sheriff or other authorized officer to notify a party to appear in court to answer a complaint" (*Bouvier's Law Dictionary*, vol. 2, 559).

Worcester defines a writ to be: "In practice, a judicial instrument by which a court commands some act to be done by the person to whom it is directed."

The above definition of the word writ, is the modern understanding and the practical definition of the word, as used by law writers and law makers at the present day.

2. There is no reason for supposing, from the act of congress or otherwise, that any difference was intended between original process under seal, or not under seal. We cannot presume, certainly, that congress intended to make any such useless distinctions, with no other object to accomplish except to complicate the law, and taking the three clauses together, above quoted from schedule "B," it is very evident that congress intended to make the necessity for a stamp

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dependent upon the amount in litigation as it appeared from the writ, giving to justice courts the privilege of litigating claims below \$100 without a stamp.

3. Every act of the legislature must be so construed as to give it some meaning, if possible, but if the limited meaning of the word "writ," which the county court has attached to it, is to be applied, then the clause in schedule "B," referring to justice courts, has no meaning whatever, because there are no justice courts which have seals, and they cannot issue "writs" under the definition of the word applied by the county court, and the result is, if we are to adopt this definition, that congress must have been ignorant of the true meaning of the word "writ," when they solemnly enacted that "no writ, summons or other process, issued by and returnable to a justice of the peace, except as hereinbefore provided, &c., shall be subject to the payment of stamp duties." And congress must also have supposed that they had provided for the taxation of some kinds of process issued by justices of the peace, otherwise they would not have inserted "except as hereinbefore provided." And there is no clause in schedule "B" which this language could refer to except that provision wherein a stamp duty is provided of fifty cents upon a "writ" issued by a court not of record, where the amount claimed in the "writ" is one hundred dollars or over.

Third. The amount claimed in the writ issued by the justice was two hundred dollars or under. Judgment might have been entered for two hundred dollars under this writ, if the proof had been sufficient. It was, therefore, within the intention of the act affixing stamp duties, and also within the express language of the act which reads "where the amount claimed in the writ." It is, therefore, the amount claimed in the writ which is to decide its liability to stamp duties.

Fourth. The act of congress clearly applied to the summons issued as the commencement of this action.

1. It required an adhesive stamp denoting a duty of 50 cents to be attached, and it is unnecessary to decide whether

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the summons was void under section 158. If the legislature requires a stamp to be affixed, it in substance prohibits the issuing one without a stamp. The summons would, therefore, be irregular without it, and if the irregularity was not waived by an appearance, the court would reverse the judgment.

The affixing a penalty to an act renders it illegal without any prohibitory words in the statute (*Hallet agt. Novion*, 14 *Johns.* 273, 290).

2. The provision of section 158, which provides that a paper issued without a stamp, with intent to evade the provisions of the act, applies only to the penalty for such omission, and by a subsequent clause of said section, such paper is made invalid whether a stamp is not affixed, with intent to evade the provisions of the act, or otherwise.

3. Every person is ordinarily presumed to do what he does do intentionally, and if there was any excuse to offer for not having attached a stamp to the summons in this action, it devolved upon the party affected by the failure to comply with the law, to show the excuse for such failure.

Fifth. The constitutionality of the act of congress was extensively discussed upon the argument before the county court.

The case of *Warren agt. Paul*, supreme court of Indiana, was principally relied upon as authority.

In that case the principal argument seemed to be, that the right of taxation of the process of state courts, necessarily implied the right of prohibiting the functions of the state tribunals.

But this logic, by the decisions of our state courts, has been demonstrated to be unsound. In *Wynehamer agt. People* (13 *N. Y. R.* 378), the court of appeals decided that a law which directly or indirectly occasioned the destruction of personal property or prohibited its enjoyment, was unconstitutional, while it is equally the well established law that the same property may be, and its use and sale are regulated and taxed to any extent which does not substantially prohibit its enjoyment. There does not seem to be any essential

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difference in regard to the power to tax the "right to justice," as it is called in *Warren agt. Paul*, or the power to tax property directly. One is a taxation of the means by which property is acquired, held and enjoyed, and the other is a tax upon the property itself; and excessive taxation in either case would be equally destructive of a man's rights, for it matters not whether you take away the means by which a man holds and enjoys property, or allow him to hold property upon such burdensome conditions that its value is destroyed. The same argument, as is demonstrated by WHITE, justice, in the German *Leiderkranz agt. Schiemann* (25 How. 388), which would take away the power of congress to require a stamp upon legal process, would do away with the whole act relating to stamp duties.

But it is perhaps sufficient for the argument upon this case that the law relating to stamp duties has been held valid all over this State, with the single exception of Judge BARNARD. In *Watson agt. Morton* (27 How. 294 ; 25 How. 388), above cited, and in a large number of cases not reported, a summons has been held void for want of a revenue stamp.

ABBOTT & WARD, *attorneys, and*
A. J. ABBOTT, *counsel for respondent.*

The only question in this case is, did the summons issued by the justice require a stamp, and was it void for not being stamped?

The law of congress provides that a "writ or other original process," &c., in any "court of record," &c., shall be stamped. That "where the amount claimed in the writ, issued by a court not of record, is one hundred dollars or over," the writ shall be stamped. It then provides that "no writ, summons or other process issued by and returnable to a justice of the peace, except as hereinbefore provided," &c., "should be subject to stamp duty."

Section 158 of said law provides that "any person or persons who shall make," &c., "any instrument," &c., "without the same being duly stamped," &c., "with intent to evade

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the provisions of this act, shall for any such offense forfeit the sum of fifty dollars, and such instrument," &c., "shall be deemed invalid and of no effect."

First. Said summons required no stamp.

1. It is not a writ—a writ at common law, must be in the name of the people, and must be under seal. (*Blackstone's Com.*; *Bouvier's Law Dic.*; *Burrill's Law Dic.* and other authorities.)

We believe the practice in the U. S. courts is the common law practice, and writs in those courts are in the name of the people and under seal. Congress must be assumed to have used the term writ in its common law sense, and as used in the federal courts at large, and not as used or defined in the local courts of any particular state.

Formerly in this state, original process were called writs, and were in the name of the people and under seal. Wherever the legislature has changed the law, and dispensed with the seal as to a certain class of writs, it has changed the designation of that class of writs, from writ to summons, indicating that the term writ as correctly defined, was no longer applicable to that class of process, but leaving the term writ still applicable to a large class of process, writs of error, or writs of commission, &c., which must still be under seal.

2. It was manifestly the intention of congress to discriminate between the terms writ and summons, the term writ being used in all three of the clauses, and the word summons only in the proviso, &c.

3. In the summons, in this case, there is no "claim in the writ" of "one hundred dollars or over," the phrase "to his damage of two hundred dollars or under" is not such claim; is no claim whatever.

The law being in derogation of the common law, affecting as it does the right of property of the citizen, and the jurisdiction of the state courts, in the administration of justice must be strictly construed.

4. There is no evidence in the case that it was the "intent (of the justice) to evade the provisions" of the law.

Second. So far as the act of congress assumes to declare

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invalid for want of a stamp the process of a state court, it is unconstitutional.

Congress has no right, under the constitution of the United States, to interfere with the independent jurisdiction of states and state courts.

No such power is granted to the general government in any of its departments, by any express or implied provision of the constitution.

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

This is a very important question, and we bespeak for it the deliberate consideration of this court. (*American Law Register*, vol. 4, No. 3, p. 157, new series; 24 *How. Prac. Rep.* 357).

By the court, E. DARWIN SMITH, J. It was the intent, I think, of the 151st section, act of congress of 1864, entitled "an act to provide internal revenue for the support of the government," to impose a stamp duty of 50 cents upon all writs, summons and other original process by which a suit was commenced in any court of record, and also of the same amount upon any writ, process or summons in a justices' court, or other court not of record, for the recovery of any sum exceeding \$100.

Construing together all the provisions in the schedule B annexed to said act and referred to in said section relating to the same subject, the imposition of stamp duties upon legal documents, I think such the fair meaning and intent of those provisions. But, however this may be, I do not think it necessary to decide this question in this case.

If the summons by which this action was commenced should have had affixed to it a revenue stamp of 50 cents, I think it too late to raise that question in a court of appeal.

Section 158 of said act as amended in chapter 78 of an act passed March 3, 1865, declares what shall be the penalty for the omission to put the proper stamp upon the legal document as required in section 151, and it is, that

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whoever shall make, sign or issue such instrument, document or paper, "with intent to evade the provisions of the said act, shall for said offense forfeit the sum of \$50; and such instrument, document or paper shall be deemed invalid and of no effect."

The omission to put the proper stamp upon any legal document, should perhaps be deemed presumptive evidence of an intent to evade the statute, but nothing more. The paper is not void, but voidable for such omission, and I think the party who has omitted to put the proper stamp upon the document, may and must have an opportunity to repel such presumption before he is subject to the penalty of the act, and before the instrument or document shall be held invalid.

The objection to the summons in this case, if valid, should have been made before the justice on the return day of the summons. The plaintiff might then have obviated the objection and satisfied the justice that the omission to put a stamp upon the summons proceeded from mistake or ignorance of the fact that one was required, and not from intent to evade the statute. Upon such proof I think the justice might have allowed the proper stamp to be then affixed to the summons. If the same question had arisen in this court, I think it would or should have allowed the proper stamp to be affixed to the summons in such case *nunc pro tunc*.

By omitting to make this objection before the justice, and before judgment, the plaintiff has lost the opportunity to rectify the mistake, and for this reason I think the defendant should be deemed to have waived the objection.

After judgment I think such an objection to the summons should not be listened to in any court.

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SUPREME COURT.

SPENCER J. REED agt. WILLIAM E. MOORE.

The opinions of a majority of the court in this case are published *ante*, p. 264.

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MASON, J. *dissenting*: The plaintiff in this case recovered a judgment on the 8th of February, 1865, against the defendant, before a justice of the peace of Broome county for \$89 damages and \$3.88 costs.

The defendant appealed to the county court of said county, and specified in his notice of appeal the following grounds of error and particulars wherein he claimed the judgment should have been more favorable to him:

First. That the justice erred in refusing to nonsuit the plaintiff on the defendant's motion.

Second. That the judgment was rendered against the law of the case.

Third. That the judgment was rendered against the evidence.

Fourth. That the judgment should have been for the defendant and not for the plaintiff.

Fifth. That the facts proven on the trial are not sufficient to constitute a cause of action against the defendant.

Sixth. That the judgment of the justice should have been made more favorable to the defendant in these particulars, viz:

1. That the justice allowed the plaintiff for 103 days for keeping the defendant's horse, at \$1 per day, and deducting therefrom 14 days' absence of horse, making the sum of \$89, when in truth and fact he should have allowed the plaintiff only \$75, being the amount claimed in the complaint for keeping said horse for 15 weeks at \$5 per week, making a difference in the damages of \$14; which sum of \$14 this defendant claims should be deducted from the amount of said judg-

Reed agt. Moore.

ment, and the judgment made more *favorable thereby* to the defendant.

2. That the justice rendered judgment for the plaintiff for \$39, when in truth and in fact he should have allowed only \$78.70, making a difference of \$10.30; which sum of \$10.30 the defendant claims should be deducted from said judgment and made more favorable to defendant.

The plaintiff within the fifteen days allowed by section 371 of the Code, served upon the defendant and the justice an offer in writing, authorizing the judgment to be reduced to the sum of \$75. This offer was not accepted by the defendant, and the cause proceeded to trial in the county court, and the plaintiff recovered a verdict against the defendant for \$70 only; and the plaintiff procured his costs to be taxed, and entered a judgment for the \$70, the amount of the verdict and also the costs of the suit; and which, on the defendant's motion, was set aside in the county court; that court holding that the plaintiff was not entitled to costs, but that the defendant was; and he ordered that the defendant's costs of the suit be set off against the plaintiff's verdict, and judgment entered for the plaintiff for the balance only, and from this order the plaintiff has appealed to this court.

The case of *Wynkoop agt. Halbut* (43 Barb. R. 266), decided by us, holds that the plaintiff was not under any obligation in this case to make an offer under the first five specifications of defendant's notice of appeal to give up his judgment entirely, and authorize a judgment to be entered for the defendant, when the trial on appeal showed that he was at least entitled to judgment in damages against the defendant for \$70; and I will content myself by referring to the reasons assigned in that case as controlling this. The argument was there made as in this case, that the appellant obtained a more favorable judgment, and therefore, within the very letter of the statute, the appellant was entitled to costs. But we held that the true rule of construction required us to look beyond the mere letter of the statute, and when the intention of the framers of the statute should be ascertained,

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it must be followed, although such construction seemed contrary to the letter of the statute, upon the principle that "a thing that is within the letter of a statute is not within the statute unless it be also within the intention of the law makers. (*Wynkoop agt. Halbut*, 43 Barb. R. 267, 268; 15 J. R. 380; *Smith on Statute Construction*, 820.)

The only remaining question in the case is whether the offer of the plaintiff to allow the judgment to be reduced to \$75, saves this respondent from costs, and entitles him to costs on this appeal. The 371st section of the Code declares that in the notice of appeal the appellant shall state in what particulars he claims the judgment should have been more favorable to him, and that within fifteen days after service of the notice of appeal, the respondent may serve upon the appellant and justice an offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal; and the section then declares that the appellant may file an acceptance of this offer within five days, and that the justice shall then correct the judgment accordingly, &c.

The statute then declares that if such offer be not made and the judgment in the county court be made more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs. The statute further declares that the respondent shall be entitled to costs where the appellant is not. This statute requires the appellant to state in his notice of appeal in what particulars he claims the judgment should have been more favorable to him; and the statute expressly restricts the right of the respondent to make his offer to allow the judgment to be corrected, to the particulars mentioned in the notice of appeal. The respondent in this case made his offer to reduce the judgment to the very smallest sum claimed in the notice of appeal, and in the very particulars claimed in the notice of appeal. He has made the offer in writing to allow the judgment to be corrected in the very particular mentioned

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in the notice of appeal. He has done all the law requires or allowed him to do by way of reducing the judgment. The only offer he could make was to have it reduced in the particular stated in the notice of appeal, and the law is not so unreasonable as to require him to do more, and no construction should be put upon this statute which will impose costs upon him under such circumstances. Such injustice never could have been intended by the framers of this statute.

The order appealed from should be reversed, with ten dollars to the appellant, and the judgment be permitted to stand, but the costs must be readjusted on the usual notice to the defendant.

COLUMBIA COUNTY COURT.

WASHINGTON DECKER agt. SAMUEL L. MYERS.

The finding of a jury on a question of fact, upon which there is conflicting evidence, is conclusive, and cannot, except in extreme cases, be reviewed on appeal.

A party cannot make his own declarations evidence in his own favor, where they are not called for by, or are not in response to anything said by the opposite party.

The admission of improper testimony upon a material issue, is not a technical error, and cannot be disregarded, though there may be upon the same question other competent and sufficient evidence. The court cannot say that the jury were not influenced by the illegal testimony.

The legal rule or measure of damages for a breach of warranty of property sold, is the difference between the value of the property as it really was, and what its value would have been had it corresponded with the warranty.

The question to the witnesses "what is the difference in value?" was improper and inadmissible. In this form it tended to elicit, and required or admitted the opinion of the witnesses upon the rule or measure of damages, and upon the amount of the damages the plaintiff was entitled to recover. A witness cannot thus be put directly in the place of the court and jury.

The value of property may be proved by the opinion of witnesses who are well acquainted with the value of similar property; but its difference in value in one condition, and in another, cannot be so shown, being a conclusion of the witness upon a mixed question of law and fact. He may give his opinion of the value of the property in one condition and its value in another; but he should first state the facts within his knowledge upon which he founds his valuation, to enable the jury to appreciate his estimate, and the jury should be left to draw their own conclusion as to the difference of value.

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Nellis agt. *McCarn* (35 Barb. 115), and *Harpending* agt. *Shoemaker* (37 Barb. 270), as to the admissibility of opinion on the question of damages, are in conflict with the long series of adjudged cases on the subject.

The objection to the inquiry in relation to the difference of value, was sufficiently specific to raise the question, whether the opinion of the witnesses was admissible, and it was not necessary to have repeated the objection to the similar inquiry of the witness Allen Miller, it having been interposed to the question to the next previous witness, and overruled by the justice.

Argued and decided June Term, 1866.

APPEAL by the defendant from a judgment against him in a justice's court. The action was brought to recover damages for a breach of warranty in the sale of a yoke of oxen by the defendant to the plaintiff, and was tried before a justice and jury in the court below. The warranty alleged in the complaint, was that the oxen were orderly, when in fact they were disorderly and unruly, and whether there was such a warranty was a disputed question of fact, and at the trial evidence was given on both sides of the question. In addition to other evidence as to the breach of the warranty, the justice, after objection by the defendant, which was overruled, permitted the plaintiff to prove his own declaration to the defendant that the oxen were unruly. No testimony was given or offered as to the value of the oxen as warranted, or as to their value as disorderly and unruly, and there was no evidence in relation to their value except as to the price paid for them. The plaintiff offered to prove on the trial, by himself as a witness, the difference in value of the oxen as warranted and as they were. This was objected to by the defendant, on the ground that no sufficient evidence had been given for its admission, and the objection having been overruled by the justice, the question "what is the difference in value?" was put to him and he answered "about fifty dollars." He then further testified, "I have bought and sold cattle on my own judgment, and have had unruly cattle before. I am 30 years old, and brought up a farmer." Allen Miller, on the part of the plaintiff, testified, "I know the parties; am 45 years old and a farmer, and always have been; have owned cattle and bought and sold cattle on my own judgment, and have heard the evidence about the cattle

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in question; the difference in the value of the cattle in question would be about fifty dollars." No objection appears to have been made to the testimony of this witness. The jury found a verdict for the plaintiff of forty-five dollars, upon which the justice rendered judgment, and the defendant appealed to this court.

C. P. COLLIER, *for appellant.*

R. E. ANDREWS, *for respondent.*

DARIUS PECK, County Judge. Whether there was a general warranty was a question of fact litigated at the trial, upon which there was conflicting testimony, and the jury having found for the plaintiff their verdict cannot be disregarded. It is a well settled rule, except in extreme cases, which very rarely occur, that the finding of a jury on a question of fact, upon which there is conflicting evidence, is conclusive, and cannot be reviewed on appeal, however much it may be against the weight of evidence. (*Brown* agt. *Wilde*, 12 *Johns. R.* 455; *Trowbridge* agt. *Baker*, 1 *Cow. R.* 251, 253; *Douglass* agt. *Tousey*, 2 *Wend. R.* 352, 356; *Stryker* agt. *Bergen*, 15 *Wend. R.* 490, 492; *Noyes* agt. *Hewitt*, 18 *Wend. R.* 141, 145; *Oakley* agt. *Van Horn*, 21 *Wend. R.* 305, 307; *Whitney* agt. *Crim*, 1 *Hill's R.* 61, 63; *Baum* agt. *Terpenny*, 3 *Id.* 75, 76; *Keeler* agt. *Fireman's Ins. Co.* 3 *Id.* 250, 256; *Donald* agt. *Edgerton*, 5 *Barb. S. C. R.* 560, 562; *Rathbone* agt. *Stanton*, 6 *Id.* 141, 143; *Adsit* agt. *Wilson*, 7 *How. Pr. R.* 64, 67; *Easton* agt. *Smith*, 1 *E. D. Smith's R.* 318; *Bennett* agt. *Scutt*, 18 *Barb. S. C. R.* 347, 350; *Mellen* agt. *Smith*, 2 *E. D. Smith's R.* 462, 463; *Wiley* agt. *Slater*, 22 *Barb. S. C. R.* 506, 507; *Smith* agt. *Hill*, *Id.* 656, 661; *Pearson* agt. *Fiske*, 2 *Hilt. R.* 146; *Mendell* agt. *French*, *Id.* 178.)

The evidence on the part of the plaintiff of his own declaration to the defendant that the oxen were unruly, not being called for by or in response to anything said by the defendant, was inadmissible, and the decision of the justice overruling the objection to it clearly erroneous. A party under such circumstances cannot make his own declarations

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evidence in his own favor. There being, however, other competent and sufficient evidence showing a breach of the warranty, it is contended that the judgment should not be reversed on account of the admission of this improper testimony. A few cases sustain this doctrine. (*Bort* agt. *Smith*, 5 Barb. S. C. R. 283, 285; *Spencer* agt. *Saratoga and Washington R. R. Co.* 12 Id. 382, 384; *Buck* agt. *Waterbury*, 13 Id. 116, 118, 119; *Harper* agt. *Leal*, 10 How. Pr. R. 276, 279, 280). But these cases are against the decided weight of authority and have been overruled by the court of appeals. (*Anthoine* agt. *Coit*, 2 Hall's Superior Court R. 40, 50; *Main* agt. *Eagle*, 1 E. D. Smith's R. 619, 621; *Hahn* agt. *Van Doren*, Id. 411; *Belden* agt. *Nicolay*, 4 Id. 14, 17; *Worrall* agt. *Parmelee*, 1 Comst. 519; *Williams* agt. *Fitch*, 18 N. Y. R. 546, 552; *Erben* agt. *Lorillard*, 19 Id. 299.) The breach of the warranty in this case was a material issue, and the improper evidence bore directly upon it. In such case the error is not a technical one and cannot be disregarded. The court cannot say that the jury were not influenced by the illegal testimony.

Another allegation of error is in the admission of illegal and improper evidence in relation to the damages for the breach of the warranty. As a general rule, the measure of damages for a breach of warranty of property sold, is the difference between the value of the property as it really was, and what its value would have been had it corresponded with the warranty. (*Voorhees* agt. *Earl*, 2 Hill's R. 288, 291; *Cary* agt. *Gruman*, 4 Id. 625; *Muller* agt. *Eno*, 14 N. Y. R. 597, 606; *Comstock* agt. *Hutchinson*, 10 Barb. S. C. R. 211, 212; *Sharon* agt. *Mosher*, 17 Id. 518, 520; *Fales* agt. *McKeon*, 2 Hilt. R. 53, 55, 56. The legal rule or measure of damages in this case was the difference between the value of the oxen at the time of the sale, if they had been as warranted, and their value as they really were. This difference in value constituted the damages. There being no evidence of the value of the oxen as warranted, or as they actually were, or otherwise, except as to the price paid for them, an opinion on the difference of value was an opinion on the amount of damages.

Baird agt. Pridmore.

whoever shall make, sign or issue such instrument, document or paper, "with intent to evade the provisions of the said act, shall for said offense forfeit the sum of \$50; and such instrument, document or paper shall be deemed invalid and of no effect."

The omission to put the proper stamp upon any legal document, should perhaps be deemed presumptive evidence of an intent to evade the statute, but nothing more. The paper is not void, but voidable for such omission, and I think the party who has omitted to put the proper stamp upon the document, may and must have an opportunity to repel such presumption before he is subject to the penalty of the act, and before the instrument or document shall be held invalid.

The objection to the summons in this case, if valid, should have been made before the justice on the return day of the summons. The plaintiff might then have obviated the objection and satisfied the justice that the omission to put a stamp upon the summons proceeded from mistake or ignorance of the fact that one was required, and not from intent to evade the statute. Upon such proof I think the justice might have allowed the proper stamp to be then affixed to the summons. If the same question had arisen in this court, I think it would or should have allowed the proper stamp to be affixed to the summons in such case *nunc pro tunc*.

By omitting to make this objection before the justice, and before judgment, the plaintiff has lost the opportunity to rectify the mistake, and for this reason I think the defendant should be deemed to have waived the objection.

After judgment I think such an objection to the summons should not be listened to in any court.

The constitutionality of the internal revenue act it seems to me is too clear for discussion. The power of congress to impose taxes for the support of government is undoubted; and while taxes are imposed for revenue purposes only, the discretion of the national legislature on the subject of taxation, cannot be reviewed in the courts of justice.

The judgment should be affirmed.

Reed agt. Moore.

SUPREME COURT.

SPENCER J. REED agt. WILLIAM E. MOORE.

The opinions of a majority of the court in this case are published *ante*, p. 264.

This dissenting opinion of Judge MASON was not received in time for publication with the others

MASON, J. *dissenting* : The plaintiff in this case recovered a judgment on the 8th of February, 1865, against the defendant, before a justice of the peace of Broome county for \$89 damages and \$3.88 costs.

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Third. That the judgment was rendered against the evidence.

Fourth. That the judgment should have been for the defendant and not for the plaintiff.

Fifth. That the facts proven on the trial are not sufficient to constitute a cause of action against the defendant.

Sixth. That the judgment of the justice should have been made more favorable to the defendant in these particulars, viz :

1. That the justice allowed the plaintiff for 103 days for keeping the defendant's horse, at \$1 per day, and deducting therefrom 14 days' absence of horse, making the sum of \$89, when in truth and fact he should have allowed the plaintiff only \$75, being the amount claimed in the complaint for keeping said horse for 15 weeks at \$5 per week, making a difference in the damages of \$14 ; which sum of \$14 this defendant claims should be deducted from the amount of said judg-

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2. That the justice rendered judgment for the plaintiff for \$89, when in truth and in fact he should have allowed only \$78.70, making a difference of \$10.30; which sum of \$10.30 the defendant claims should be deducted from said judgment and made more favorable to defendant.

The plaintiff within the fifteen days allowed by section 371 of the Code, served upon the defendant and the justice an offer in writing, authorizing the judgment to be reduced to the sum of \$75. This offer was not accepted by the defendant, and the cause proceeded to trial in the county court, and the plaintiff recovered a verdict against the defendant for \$70 only; and the plaintiff procured his costs to be taxed, and entered a judgment for the \$70, the amount of the verdict and also the costs of the suit; and which, on the defendant's motion, was set aside in the county court; that court holding that the plaintiff was not entitled to costs, but that the defendant was; and he ordered that the defendant's costs of the suit be set off against the plaintiff's verdict, and judgment entered for the plaintiff for the balance only, and from this order the plaintiff has appealed to this court.

The case of *Wynkoop agt. Halbut* (43 Barb. R. 266), decided by us, holds that the plaintiff was not under any obligation in this case to make an offer under the first five specifications of defendant's notice of appeal to give up his judgment entirely, and authorize a judgment to be entered for the defendant, when the trial on appeal showed that he was at least entitled to judgment in damages against the defendant for \$70; and I will content myself by referring to the reasons assigned in that case as controlling this. The argument was there made as in this case, that the appellant obtained a more favorable judgment, and therefore, within the very letter of the statute, the appellant was entitled to costs. But we held that the true rule of construction required us to look beyond the mere letter of the statute, and when the intention of the framers of the statute should be ascertained,

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The statute then declares that if such offer be not made and the judgment in the county court be made more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs. The statute further declares that the respondent shall be entitled to costs where the appellant is not. This statute requires the appellant to state in his notice of appeal in what particulars he claims the judgment should have been more favorable to him ; and the statute expressly restricts the right of the respondent to make his offer to allow the judgment to be corrected, to the particulars mentioned in the notice of appeal. The respondent in this case made his offer to reduce the judgment to the very smallest sum claimed in the notice of appeal, and in the very particulars claimed in the notice of appeal. He has made the offer in writing to allow the judgment to be corrected in the very particular mentioned

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St. James Church agt. The Church of the Redeemer.

lar choses in action from a brother of the plaintiff (J. W. Butler), which he lawfully sold and accounted to him for the proceeds. Such affidavit is contradicted by the affidavit of such brother of the plaintiff, who states that the defendant knew the stock sold by him belonged to such plaintiff.

The receipt and sale of such choses in action by the defendant is admitted, the only controversy is as to whom they belonged, which properly will come in question on the trial. Were it permissible to try such question by affidavit, the testimony of the disinterested witness for the plaintiff must have more weight than that of the defendant.

The motion must be denied with ten dollars costs.

SUPREME COURT.

THE WARDENS AND VESTRY OF ST. JAMES CHURCH agt. THE RECTOR, VESTRY AND WARDENS OF THE CHURCH OF THE REDEEMER.

When the same persons act in a double capacity, as *agents* or *trustees*, they must see to it that their transactions are fair and unexceptionable, as regards the rights of either of the parties they represent. If any motive of personal convenience or interest has been subserved, it will constitute a badge of *fraud*.

Where several persons acting for the Church of the Redeemer—the defendants, as *trustees*, presented an application to themselves as *trustees* of the Church of St. James—the plaintiffs, for pecuniary aid; and the same persons acting for the plaintiffs, granted the application, and caused to be conveyed to the defendants, real estate, producing nearly two-thirds of the whole income of the plaintiffs, *without the payment of any consideration*, but for the sole purpose of affording pecuniary assistance gratuitously—*Held*, that the transaction was *destitute of honesty*.

And the order of this court permitting the conveyance constituted no *estoppel* in favor of the grantee, who had parted with nothing as the consideration for the deed. The order was not an adjudication between the parties, and had not the effect of *res adjudicata*.

New York General Term November, 1865.

Before INGRAHAM, P. J., LEONARD and BARNARD, Justices.

By the court, LEONARD, J. Certain persons in February, 1853, became vestrymen in both of the church corporations,

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which are the parties, plaintiff and defendant in this action. Without any consideration paid to the corporation of St. James, the majority of these vestrymen caused and procured certain real estate which belonged to that church to be conveyed to the Church of the Redeemer. The simple statement of these facts, so found by the court, without the support of other facts also found, establishes the fraudulent character of the conveyance.

Stating the case with more precision, the Church of St. James had two wardens and seven vestrymen; the Church of the Redeemer had two wardens and eight vestrymen. Of these one of the wardens and six of the vestrymen of St. James were also vestrymen of the Church of the Redeemer; and one of the wardens and six of the vestrymen of the Church of the Redeemer, were also vestrymen of the Church of St. James. One of the wardens and two of the vestrymen of St. James only abstained from participating in the wrong. These church officers were the trustees of the temporal affairs of the respective corporations. It is a well settled principle that no man can deal with himself in two capacities. The conveyance to the Church of the Redeemer relieved those trustees who preferred to attend that church, from some part of the expense of sustaining it, and promoted the temporal welfare of the church which they found it most convenient for them to attend. By causing this conveyance to be made, they thereby, to some extent promoted their own personal convenience and interest.

When the same person acts in a double capacity as agent or trustee, he must see to it that the transaction is fair and unexceptionable, as regards the rights of either of the parties which he so represents. If any motive of personal convenience or interest has been subserved, it will constitute a badge of fraud.

Several persons acting for the Church of the Redeemer as trustees, presented an application to themselves as trustees of the Church of St. James, for pecuniary aid, and the same persons acting for the last named church granted the application, and caused to be conveyed to the applicant church

Siefke agt. Koch.

real estate producing nearly two-thirds of the whole income of the Church of St. James, without the payment of any price, but for the sole purpose of affording pecuniary assistance gratuitously.

The statement proves the transaction to be destitute of honesty.

The order of this court permitting the conveyance, constitutes no *estoppel* in favor of a grantee who has parted with nothing as the consideration for the deed. Without the authorization of the court, the grant of the real estate of a religious corporation is of no more value than waste paper, and the party injured would require no proof in such a case to establish its invalidity.

The order of the court gives the deed merely regularity of form, and renders additional proof necessary to overthrow it, as in other cases where an objection is raised to the validity of a deed.

The order is not an adjudication between the parties, and has not the effect of *res judicata*.

The statute of limitations was referred to at the argument of the appeal as a defense, but on an examination of the pleadings it appears that no such defense has been set up. The statute of limitations must be pleaded, or it is not available as a defense.

I see nothing to warrant the court in holding the cause of action to be stale.

The judgment should be affirmed, with costs.

NEW YORK COMMON PLEAS.

FREDERICK SIEFKE agt. ANDREW KOCH.

The *assignee* of a lease reserving rent, is liable for rent only as long as he remains in the legal relation of assignee ; and when he assigns to another, and the latter accepts the assignment, all further liability on the part of the former is at an end.

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The *consent* of the landlord or lessor, that the lessee may assign the lease to another, operates as a *discharge thereafter* of the covenant that the lease should not be assigned, without the lessor's consent.

General Term February, 1866.

Before DALY, F. J., BRADY and CARDOZO, Judges.

By the court, DALY, F. J. This action was brought against the defendant, the assignee of a lease, to recover for rent which had accrued after he had ceased to be assignee.

The defendant was liable for rent only as long as he remained in the legal relation of assignee, and when he assigned to Brantingham, and the latter went into possession under the assignment, all further liability on the part of the defendant was at an end. (*Journecay agt. Brackley*, 1 *Hilt.* 452 ; *Lekeux agt. Nash*, 2 *Str.* 122.)

The consent of the plaintiff that Krakenbuhl, the lessee, might assign to the defendant, operated as a discharge thereafter of the covenant that the lease should not be assigned without the plaintiff's consent, and the defendant took by the assignment the remaining interest in the premises, free from the restraint of that condition. (*Dumfers case*, 4 *Coke*, 119 ; *Dakin agt. Williams*, 21 *Wend.* 457.)

The jury were told that this was the law, and yet in direct contravention of the judge's charge, there being no conflict in the evidence, they found a verdict for the plaintiff.

The judgment should be set aside.

Mayor, &c., of New York agt. The Board of Health.

SUPREME COURT.

JOHN T. HOFFMAN, Mayor of the City of New York; JOHN K. HACKETT, Recorder of the City and County of New York; MATTHEW T. BRENNAN, Comptroller of the City of New York; DANIEL DEVLIN, Chamberlain and Treasurer of the City of New York; and JAMES O'BRIEN, Chairman of the Finance Committee of the Board of Aldermen; and GEORGE D. KELLOGG, Chairman of the Finance Committee of the Board of Councilmen of the City of New York, constituting the Commissioners of the Sinking Fund of the City of New York

agt.

JACKSON S. SCHULTZ, JAMES CRANE, WILLARD PARKER, JOHN O. STONE and JOHN SWINBURNE, Sanitary Commissioners of the Metropolitan Sanitary District; THOMAS C. ACTON, JOSEPH S. BOSWORTH, JOHN G. BERGEN and BENJAMIN F. MANIERRE, Commissioners of the Metropolitan Police, constituting the Metropolitan Board of Health.

The *Commissioners of the Sinking Fund* of the city of New York, have a sufficient interest in and to the revenues from the *public markets* in the city, to warrant them in bringing an action against the *Board of Health* of said city, to restrain them from interfering with said markets.

The *Board of Health* have no power to remove, tear down, or in any way to interfere with the *stands or stalls attached to a public market* in the city of New York, on the ground that they are an *obstruction upon the public street, or a nuisance*.

The act creating the *Board of Health* is to be construed as applicable only to such obstructions as are *dangerous to life or health*, and if not of that character, it does not apply.

If unlawful obstructions are placed or erected in a public street, they become a *nuisance*; and when this is the case it does not need the power of a board of health to remove it. Any citizen has a right, in a proper manner, to abate a nuisance; but it must be a nuisance which the *law declares to be such*, and not one merely declared so by any board or individual. It may well be doubted whether the legislature can delegate to any body of men the power to declare what is, or what is not a nuisance.

It is not by any means certain that the extension of a public market in the city of New York, *over the sidewalk*, is such an obstruction of the public street, that may on account of its illegality, be declared a *public nuisance*.

The rule that the party has a remedy by action in the recovery of damages against a party for exceeding its powers, and therefore an *injunctio*n should not issue, may be proper as to individuals, but is not applicable where both parties represent the public, and where the loss must fall upon the public whoever succeeds.

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New York Special Term July, 1866.

THIS was a motion to dissolve an injunction heretofore obtained by the plaintiffs under the following circumstances : The plaintiffs are the commissioners of the sinking fund, empowered, among other things, to receive all market rents belonging to the city ; they receive considerable sums from the stands in Washington market, and from the stalls upon the sidewalks and portions of West, Fulton and Vesey streets, surrounding it. They allege that neither said market, nor any portion of it, nor of the stalls around it are a nuisance or detrimental to health ; that the defendants threatened to tear down the stalls and stands upon the streets and sidewalks, and that if this is done it will inflict irreparable injury.

The defendants alleged, on the contrary, that said stands and stalls on the sidewalks and streets are a nuisance and detrimental to health, and an obstruction upon the public streets and sidewalks, which, in their opinion, are liable to lead to results detrimental to the public ; that they took and filed among their records what they regarded as sufficient proof to authorize their declaration that the same were such, and entered them upon their records as such, and made an order that they be removed, which order was duly served upon all persons interested, and that no party had applied for a hearing. They further showed that the stands and stalls were in fact upon the public street.

CHARLES TRACY *and*

GEORGE BLISS, JR., *for the defendants.*

The injunction herein must be dissolved for the following reasons :

I. Because an injunction will not lie against the board of health, any errors it may commit are to be remedied in some other manner. (*Hyatt agt. Bates*, 35 Barb. 308, 314, 317, 318 ; *People ex rel. Savage agt. Board of Health* 33 Barb. 344 ; *N. Y. Life Ins. Co. agt. Supervisors*, 4 Duer, 192. 199 ; *Mayor of Brooklyn agt. Meserole*, 26 Wend. 132 ; *Woodruff*

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agt. *Fisher*, 17 Barb. 224, 234, 236; *People* agt. *Denslow*, 1st Caine's, 177, 180; *Van Wormer* agt. *Mayor*, 15 Wend. 262; *Hartwell* agt. *Armstrong*, 19 Barb. 166; *Wiggins* agt. *Mayor*, 9 Paige, 16; *Walker* agt. *Devereux*, 4 Paige 229; *Leigh* agt. *Westervelt*, 2 Duer, 618, 620, 621; *Philips* agt. *Wickham*, 1 Paige, 590; *Bleecker* agt. *Farrar*, 8 Allen, 325, 327, 329; *Heywood* agt. *Buffalo*, 14 N. Y. 534, 539; *Chemical Bank* agt. *Mayor*, 1 Abb. 79; *Thompson* agt. *Commissioners*, 2 Abb. 250, 251.)

II. Even if the board of health is wrong in its action, it amounts at most only to a mere trespass or tort, against which an injunction will not lie. (*Albany and North R. R. Co.* agt. *Bonnell*, 24 N. Y. 345, 348; *Mayor* agt. *Comover*, 5 Abb. 171; *Benton* agt. *City*, 15 Barb. 392; *Van Rensselaer* agt. *Griswold*, 3 N. Y. Leg. Obs. 94; *Jerome* agt. *Ross*, 7 Johns. Ch. 331.)

III. Nor assuming that the board of health is wrong, can the injunction be sustained on any other ground, such as irreparable injury, or the like? (*Thomson* agt. *Matthews*, 2 Edw. 312; *Heywood* agt. *Buffalo*, 14 N. Y. 534; *Gilbert* agt. *Mickle*, 4 Sand. Chan. 357; *Mutual Ben. Life Ins. Co.* agt. *Supervisors*, 33 Barb. 322.)

IV. But the proceedings of the board of health were strictly regular. They conformed in every respect to the provisions of the law creating them, as far as they had gone, and certainly cannot be enjoined till they have closed the case before them. (*Laws of 1866*, chap. 74, § 14; *Affidavit of Jackson S. Schultz*; cases under first point.)

V. The act establishing the board and the amendatory act are constitutional. (*Van Wormer* agt. *Mayor*, 15 Wend. 262; *People ex rel. Savage* agt. *Board of Health*, 33 Barb. 344; *Laws of 1850*, chap. 324; 2 R. S. 5th ed. 53; *Laws of 1850*, chap. 275; 2 R. S. 5th ed. 1 to 20.)

VI. The class of cases to which this belongs, is not one in which there is any right of trial by jury. (*Authorities cited under last point*; see also *Laws of 1823*, pp. 14, 79, 80, § 39; *Laws of 1827*, p. 139, §§ 24 to 33; Part 1, R. Stat.

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Chap. 14, Titles 1 and 3 ; Reviser's note to same chapter, " heretofore " means before 1846 ; Liv. agt. Mayor, 8 Wend. 85.)

VII. Nor does the action of the board affect the property of the plaintiff in any manner that is forbidden by the constitution. (*Wynehamer agt. People, 3 Kern. 386, 398, 401, 422, 435 ; Mayor agt. Slack, 3 Wheeler, C. C. 237 ; Brick Church agt. Mayor, 5 Cow. 538 ; Coates agt. Mayor, 7 Cow. 585 ; State agt. Mayor, 3 Duer, 148 ; West Saving Ins. Co agt. City of Philadelphia, 31 Penn. 175 ; Grant agt. Courter, 24 Barb. 232 ; Mayor agt. Second Av. R. R. Co. 32 N. Y. 261, 272 ; Baker agt. Boston, 12 Pick. 184 ; Beecher agt. Farrar, 8 Allen, 325 ; People agt. Mayor, 32 Barb. 112 ; People agt. Hoym, 20 How. 76.*) There is no distinction. If the stalls are taken down the materials remain.

VIII. There is no force in any of the constitutional objections raised by plaintiffs' counsel.

1. As to service of notice, the legislature may prescribe, and in this case there is full provision for personal and substituted service. (*Matter of Empire City Bank, 18 N. Y. 200, 216 ; Pamphlet act, pp. 13 and 15.*)

2. As to form of notice, law says (*p. 13*), that a hearing shall be given at a time to be fixed on application. This is all that is needed, and very different from the case cited from *1 Gray*.

3. As to presumption that acts are regular (*Hand agt. Ballou, 12 N. Y. 541*).

4. There is no greater mingling of the legislative, judicial and executive power, than is always found in every health law, in every drainage law, highway law, and every public improvement act (*See cases cited under first point*).

5. It is constitutional to give power to declare a thing or a business a nuisance (*People agt. Board of Health, 33 Barb. 344*).

6. Making first order, the board does no more than make an order to show cause ; *prima facie*, they declare his business a nuisance, as a court declares a temporary injunction may be granted, but it does not follow that the court has

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prejudged the case. In each instance, if there is no appearance, a final order will be made.

7. The law is not to be declared unconstitutional, because it is assumed a party will have no right to examine witnesses, or to cross-examine opposing witnesses, or that evidence will not be on oath; on the contrary, every presumption is to be made in favor of the law.

8. It was quite constitutional for the legislature to confer the powers on the board of health which it has conferred. (15 N. Y. 332; 15 N. Y. 300.)

IX. Even if in some respects the law should be held to be unconstitutional, it clearly is not so as a whole, nor in its application as developed in this case.

There is no question of want of notice, of illegal entry and search, of destruction of property, or anything of the kind.

The plaintiffs had notice by what was in substance an order to show cause; it was served on them personally.

ABRAHAM R. LAWRENCE, JR., *and*
WILLIAM F. ALLEN, *for plaintiffs.*

I. The act to create a metropolitan sanitary district, &c., is in violation of the constitution of the state.

1. It invades and breaks up the local divisions of the state, as recognized by the constitution, and interferes with the arrangements to which counties and cities are subservient or instrumental, and in which their agency is contemplated. (*Const. art. 1, § 17; art. 10, &c.; 1 R. S. 83, per DENIO, J; People agt. Draper, 15 N. Y. R. 542.*)

2. It confers upon a new body, unknown to the constitution, legislative authority over a part of the state, erecting that part into a separate and distinct local organization for this special purpose. The constitution vests the legislative power in the senate and assembly, with power to confer such power upon the board of supervisors (*Const. art. 3, §§ 1, 17.*)

The board act in a legislative capacity in most of the matters over which they assume jurisdiction. (*People agt.*

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Board of Health of N. Y. 33 Barb. 344; *Baker agt. City of Boston*, 12 Pick. 184; *Coates agt. Mayor of N. Y.* 7 Cow. 585.)

They are not confined in their acts to administering the laws enacted by the legislature, or executing the sanitary regulations and ordinances of the state, or local legislation, but are authorized to, and do in fact, make and prescribe the laws and regulations which they seek to enforce. The legislative power in matters affecting the city, is in the common council (*Val. Laws*, 252, 256, 269.)

3. It assumes to and does create a judicial tribunal not authorized by the constitution, and the judges of which are not elected as the constitution requires in all cases of a local judiciary. Their acts are declared to be judicial, and they have power to issue criminal process. (*Act*, § 14, *sub.* 2; *Const. art.* 6, §§ 14, 18; 15 N. Y. 297.)

II. The law does not, neither can an act of the legislature, confer upon this body, or any body of men, the right to destroy the property of individuals. Nuisances may be abated by the destruction of property, when it becomes necessary; and the necessity must exist and be shown in justification of the act in actions brought. The power and the right results from the great law of necessity, and cannot be, and is not conferred upon any body of men. It is a power that cannot, in the nature of things, exist under the law, and the board of health has no more authority and discretion in the premises than a private citizen. Property does not lose its character as property, nor the owner forfeit his right in it because it is offensive or noxious, or an obstruction to the free use and enjoyment of a street or common. A party cannot be deprived of his property except by due process of law. (*Const. U. S. amendments*, art. 5; *Const. of State of New York*, art. 1, § 7; *People agt. Corp. of Albany*, 11 Wend. R. 539; *Rogers agt. Barker*, 31 Barb. 447.) "Due process of law" (*Embury agt. Conner*, 3 Comst. 511).

It means a trial according to the course of the common law, and not by mere legislation. (*Taylor agt. Porter*, 4 Hill, 140; *Westervelt agt. Grigg*, 2 Kern. 212; *Wynehamer*

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agt. *People*, 3 *Kern*. 378, 393, 416, 445 ; *Burch* agt. *Newbury*, 6 *Seld.* 374, 397.)

The act does not profess to give the board of health the power to destroy property. A removal of the stands or stalls is necessarily a destruction of them and of the business of the occupant.

III. The whole power of the board of health is restricted by the terms of the act, to dealing with such matters as affect the health of the community. Their powers and duties are strictly sanitary in their character. Nuisances that do not affect the public health, are without their jurisdiction.

The streets of the city may be obstructed and rendered impassable, and the individual members of the board of health must climb over or get around the obstructions as best they may, or apply to the proper authorities to remove them, or exercise the right of removing them as individuals, and subject to the same accountability as other individuals.

The amendments to section 12 of the original act, may have been intended by the projector of them, in his greed for power, to displace the city authorities in their control over the streets, but that could not have been the intent of the legislature. They are all to be interpreted with respect to the general purposes of the act and the general powers conferred.

The maxim "*noscitur a sociis*," will control the interpretation. (*Corning* agt. *McCullough*, 1 *Comst.* 47, 69 ; *St. John* agt. *A. M. Mut. F. N. Ins. Co.* 1 *Kern*. 516, 529 ; *Buckley* agt. *Buckley*, 11 *Barb.* 43, 53 ; *Ellicotville and P. R. Co.* agt. *Buffalo, &c. R. R. Co.* 20 *Barb.* 644 ; *Broom's Leg. Max.* 294, 296.)

IV. The stands and stalls proposed to be removed, are only a nuisance as obstructions to the public streets, if they are in or do obstruct the streets, which is not admitted. The proceedings and order, with some slight attempt to conceal the truth and give color to the measure as a sanitary measure, are upon the ground that the structures obstruct the free use of the street by the public.—

V. The whole subject of markets, their locations and gen-

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eral regulations, except as to cleanliness, which may be within the jurisdiction of the board of health, and the care of the streets, is committed to the city authorities, who alone have the power to act in the premises. (*St. John* agt. *Mayor*, 6 *Duer*, 315; *Matter 17th Street*, 1 *Wend. R.* 262; *N. Y. & N. H. R. R. Co.* agt. *Mayor*, 1 *Hill*, 522; *Naylor* agt. *Glazier*, 5 *Duer*, 161; *Montgomery charter*; *Valentine's City Laws*, p. 228, § 17; p. 248, § 40; *Id.* p. 251, § 4; *Revised Ordinances of 1857*, pp. 280, 284, especially 284, § 23.)

If the board of health have any power to remove obstructions in the streets, or to locate or remove markets, or regulate them, except as to cleanliness, it is a power exclusive and permanent, and the city authorities are divested of those powers vested in them by the city charter's past legislatures, and the necessities of the case, which is not claimed, exclusive power is vested in the board of health as to all matters committed to their charge (*act*, § 12).

VI. The stands and stalls in question were built by direction of the common council and by the city authorities, and have been leased and rented by the city for the benefit of the sinking fund, and cannot be removed by order of the board of health (*People* agt. *Corp. of Albany*, 11 *Wend. R.* 539).

VII. Markets for the sale of meats, fish and vegetables, are not nuisances *per se*, and the papers all show that these stands are not nuisances from the manner in which they are kept and occupied. The facts alleged in the complaint are not denied, and the answering affidavits place the matters beyond all controversy.

VIII. The defendants should have spread upon the record that which they regarded as proof, the facts, or the evidence of facts upon which they acted, that the court might see that the board had at least colorable ground for proceeding to destroy the property. Nothing will be assumed or presumed in favor of the jurisdiction, or in support of acts for the destruction of private property without compensation. The defendants are bound to justify their order and proposed action, with the same evidence that they would be called

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upon to produce if the threatened acts had been consummated, and they were sued as trespassers.

IX. The parties proceeded against are not confined to the hearing (according to the rules or directions of said board), prescribed by the 14th section; an omission to apply for a hearing before a tribunal, that has already prejudged the case, and composed of gentlemen who are judges, prosecutors and witnesses, does not confer jurisdiction or make that legal, which but for that omission would have been illegal. Before we can be deprived of our property, we are entitled to a full and fair hearing under the constitution, according to the course of the common law, and before a judicial body.

X. The commissioners of the sinking fund, as trustees, have a right to protect the fund committed to their charge; and it is no answer to say that the creditors of the city will be paid, notwithstanding the particular fund may be spoiled and robbed. Neither is it for the wrong doer to say that the fund is the fruit of a wrong against the public committed years gone by.

INGRAHAM, J. An injunction was granted in this case restraining the defendants from removing, tearing down, or in any way interfering with the stands or stalls attached to and forming a part of Washington market. The defendants move to dissolve the injunction. Several questions were discussed before me on the argument, which I propose to notice so far as I consider them applicable to the decision of the motion.

As to the rights of the plaintiffs to maintain this action, although it would, perhaps, have been better if the corporate authorities who own the fee of the market, and who, by law, were authorized to establish it, had been joined with the plaintiffs, I am of opinion that they have a sufficient interest, as commissioners of the sinking fund, to maintain this action. They are, by virtue of the statute, authorized to collect and apply to the payment of the city debt the proceeds of rents, &c., from the public markets, and, as such trustees, they have a right, and it is their duty, to protect the property

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from destruction from which such rents accrue, and to see that they are properly applied to the payment of the public debt.

The ordinance of the common council places all the revenues from the public markets in their charge, and by a subsequent statute that ordinance was recognized and no alteration therein could be made without the assent of the legislature.

For these reasons, I think the plaintiffs have a sufficient interest in and title to the revenues from this market, to warrant them in bringing this action.

The question then arises, whether the defendants under the statutes giving them existence as the board of health, and the amendatory act, have any authority to order the market or any part of it to be removed?

The statute under which this board was organized, was evidently intended solely for the purpose of preserving and promoting the public health—such is plainly shown by its title, and such are all the provisions contained in the act (*Chapter 74 of 1866*). The 12th section expressly declares their powers to be for the greater protection and security of health and life in the metropolitan district, and the powers taken from the corporate body and conferred upon this board, are those which relate to the preservation and protection of life or health. In the amendatory act (*chapter 686*), there is nothing showing any intent to depart from the great object which led to the formation of the board of health, unless something can be found in the third section of the amended act to which I will refer hereafter. I will here add, however, that the wording of that section, which is intended as amending the 12th section of the original act, also continues the limitation “to be for the purpose of preserving or protecting life and health or preventing disease;” and the powers conferred are to be exercised for the greater protection and security of health and life in said district, &c.; and by that section the powers so conferred were to be construed to include the removal of any obstruction, matter or thing in the public streets, sidewalks or places which should be in

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their opinion liable to lead to results detrimental to the public, or dangerous to life or health, the prevention of accidents by which life or health may be endangered, and generally the abating of all nuisances. There can be no doubt in adopting the principle, that the powers conferred by these acts were all intended as powers necessary to the preservation of the public health and of life; and that this was the object for which the statutes were passed. If so, then in ascertaining what powers were conferred, we must be governed solely by the inquiry, whether they relate to the object which the legislature had in view in passing the laws, and if so, the authority to remove obstructions or other matters in the public streets, sidewalks or other public places, is only to be considered as granted with a view to carry into effect the general purposes of the acts under consideration. It was not pretended on the argument that this action of the board of health, in removing any portion of the market was necessary to the preservation of the public health or the protection of life; but, as I understood the counsel, the objection to the stalls sought to be removed, was upon the suggestion that such stalls were an obstruction upon a public street, and a nuisance in the opinion of the board of health detrimental to life. Such, too, is the allegation in the answer in setting out the entry in its records on this subject; but what that entry was, is not particularly stated in the answer, except as the general conclusion. If it was intended to rely on the fact of the stalls being injurious or dangerous to life or health, the records for such a conclusion should be stated, so that it might appear that the board had before them evidence upon which such a decision could be formed. There is a report from the officers of the board stating that in their opinion the stalls impeded ventilation.

I shall, however, consider the powers of the board as exercised in this matter upon the ground stated, that the stalls were either an obstruction upon the public street or a nuisance.

I have already stated that in my judgment the act is to be construed as applicable only to such obstructions as were

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dangerous to life or health, and, if not of that character, that it did not apply.

That it would be a nuisance, if it was an unlawful obstruction of a public street, must be conceded, and when that is the case, it does not need the power of a board of health to remove it. Any citizen has a right to abate a public nuisance in a street, if he does it in a proper manner, but it must be a nuisance which the law holds to be such, and not one merely declared so by any board or individual. It must be a nuisance as adjudged to be such by law. It may well be doubted whether the legislature can delegate to any body of men the power to declare what is or what is not a nuisance. Such power would be equal to a power to declare what should be a criminal act; because it is a crime to maintain a public nuisance, and if the legislature can delegate to individuals the power to define a nuisance, they can delegate to them the power to make acts criminal which are not so by law. Such a power cannot be delegated to others by the legislature. They may authorize boards of health to pass ordinances necessary for the objects of their creation, but they cannot delegate to them the power to define what shall be a nuisance, or make acts criminal, which the law holds to be innocent.

The ground which was declared for holding these stalls to be a nuisance, was that they were obstructions in the public streets. Whether they are unlawful obstructions is not by any means free from doubt. The power to keep markets in the city was given by the Dongan charter, and afterwards in the charter of 1730, the power to the common council to establish markets was more fully granted, so as to authorize markets to be held in the public streets, which were named as they then existed, and with authority to have, hold and keep such and so many other markets at such places in the city, as shall from time to time be ordered, established, erected and appointed by the common council.

Under this authority the corporation frequently erected markets in the public streets. It is not beyond the memory of many of the inhabitants, to call to mind the markets in

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Maiden Lane, near Broadway, and from Water to South streets, in Old-slip, in Wall street, and in the street near where the present Washington market is erected.

These markets were not, as far as I can ascertain, erected under any other authority than that contained in the charter of the city. I am not prepared, therefore, to say that an extension of one of these markets over the sidewalk, is such an obstruction of the public street that may, on account of its illegality, be declared a public nuisance. On the contrary, until otherwise judicially determined, I should be inclined to hold such extension of the market to be within the chartered powers of the corporation, or, at least, that before the board of health could declare it to be a nuisance for that cause, they should obtain a judicial determination that the facts exist which make it such a nuisance. The power is given by the legislature to regulate and control the public markets, but that power is limited, viz: "So far as relates to the cleanliness, ventilation and drainage thereof, and to the prevention of the sale, or offering for sale, of improper articles therein." This limitation of their power over the markets excludes all other right to interfere with them, unless some other authority can be found for it. I do not consider it to be either an unlawful obstruction upon the street or a nuisance as such is defined to be by law, and I can see no authority by which the defendants, under the powers vested in them, can order them to be removed for these causes. I consider the powers of a board of health to be very extensive, and in some respects without control, but these powers are only in connection with the subject matter for which such board is called into existence; but when they go beyond such authority and attempt to control and regulate the public affairs, irrespective of the preservation of the public health, they attempt the exercise of powers not vested in them, and do acts which the courts should restrain.

It was urged before me, that even if the board of health were in error, and should do an injury to the city property in which they exceeded their powers, that there was a remedy

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by action in the recovery of damages, and therefore an injunction was not a proper remedy. Such a rule may be proper as to individuals, but is not, I think, applicable to a case where the parties both represent the public, and where the loss must fall upon the public, whoever succeeds.

It is not well to apply such a rule to a case where the loss in any event must be paid out of the treasury, for the purpose of allowing different public bodies, invested with powers for the government of the city, to engage in a contest between themselves, and to exert their powers against each other.

Instead of such a course, it would be much more to the interest of the public treasury, and far more consistent with a proper discharge of public duties, if these different bodies should harmoniously endeavor to promote the public welfare in accordance with the provisions of law, rather than to waste the public property by its unnecessary destruction or by costly litigation.

The motion to dissolve the injunction is denied.

SUPREME COURT.

HENRY H. SEGUINE and others agt. JACKSON S. SCHULTZ
and others.

By the statute establishing and regulating *quarantine* at the lower bay of New York, the legislature never intended that *Staten Island* should be a place where any operation of quarantine, except to bury the dead, should be carried on. Therefore, the *commissioners of quarantine*, or the *metropolitan board of health*, or both jointly, will be restrained by injunction from removing from the quarantine vessels any persons who are the subjects of quarantine treatment, to Seguine's Point on Staten Island.

Brooklyn Special Term July, 1866.

THIS was a motion for an injunction. The plaintiffs are land owners and residents in the vicinity of Seguine's Point, Staten Island. The defendants are the metropolitan board of health, the commissioners of quarantine and the commissioners of emigration. The plaintiffs allege that the defend-

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ants are about to erect hospitals near Seguine's Point, upon land which they have obtained ; that such hospitals are to be used for keeping persons sick with cholera and other diseases, or who have been exposed to it and brought from ships at quarantine. The further allegations of the plaintiffs sufficiently appear in the quotations contained in the points for the board of health, which also show in part the nature of their affidavits in reply. The latter were very numerous, many of them being from physicians, to show that the proposed use of the ground would not be dangerous to the neighbors, but as the case was decided upon a question of statute law, it is not deemed necessary to refer further to their contents.

TOMPKINS WESTERVELT *and*
JAMES T. BRADY, *for plaintiffs.*

I. The affidavits on the part of the plaintiffs, make out a proper case for the injunction prayed for.

1. They show the acts sought to be enjoined would greatly injure and depreciate the plaintiffs property. The affidavits show that the real estate of plaintiffs, situate in the immediate vicinity of the premises on which the acts sought to be restrained are proposed to be done by the defendants, is in value about \$160,000, to wit :

Seguine	\$80,000
Latourette	40,000
Androuette	18,000
Wood	15,000
Johnson	7,000

This fact appears in the affidavits of these parties, and is corroborated by the short affidavits of several others, who state they know the facts set forth in the longer affidavits, and that the same are true.

These affidavits all show that the proposed action of the defendants will injure and depreciate the value of plaintiffs premises at least one-third, or over \$50,000, and a similar depreciation would of course result in the value of all the

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neighboring property, damaging it to the extent of many hundreds of thousands of dollars.

One of the plaintiffs, Latourette, swears to an instance already occurred, where a sale of part of his premises for \$500 an acre, agreed upon before the defendants' intentions were known, has been frustrated, and the purchasers refuse to take the property even at \$400 an acre—a reduction of 20 per cent. This depreciation was caused by the mere publication of the defendants intention. What would it be when that intention had ripened into action?

2. The affidavits show danger to life and health. The dense population of the neighborhood, one thousand people within a mile of the proposed quarantine, eleven railroad trains passing daily within a short distance, the prevalent wind directly from the proposed quarantine to the most densely peopled part of the neighborhood.

The plaintiffs own residences are in the immediate vicinity, some of them within a few hundred yards.

Three physicians of standing and experience, resident in the neighborhood, and familiar with the population and locality, testify that the proposed location of a quarantine by the defendants would be very dangerous.

3. The danger and exposure is of course an element also in the depreciation of the value of property.

4. The affidavits also show that the proposed acts of defendants would interfere with the lawful exercise, by plaintiffs and others, of their lawful business in the catching and caring for oysters, of which they have great numbers planted in neighboring waters.

II. The damage and danger to the plaintiffs and others proved by the affidavits, as aforesaid, is sufficient ground for the injunction, unless there is superior right in the defendants to use the premises which they occupy for the purpose complained of. No such right exists.

1. Quarantine and quarantine operations are creatures of positive law. Such establishments and operations cannot lawfully exist, be maintained or carried on anywhere, except

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by virtue of the enabling or sustaining force of some positive enactment permitting or establishing them.

There is no such statutory provision or permission for the carrying on of any quarantine operations at the place where such operations are now sought to be enjoined. The location of all quarantine operations for the present and for the future is fixed by the acts. (*Chap. 358 of Session Laws of 1863, and chap. 751 of Laws of 1866; see Laws of 1863, ch. 358, § 2, p. 573; § 3, p. 573; §§ 6, 7, 8, p. 574; Laws of 1866, ch. 751, § 2.*)

So far from permitting quarantine operations at the place where they are now sought to be enjoined, they are expressly forbidden at that place or any other on Staten Island, and are located at present afloat at least two miles from Staten Island, and for the future and permanently, on the west bank shoal at least $1\frac{1}{2}$ miles from Staten Island.

Moreover, the act of 1863 orders the immediate sale of these very premises, and thus in the strongest manner contradicts any intention of the legislature to have any quarantine or quarantine establishment erected there (*Laws of 1866, ch. 358, § 42, pp. 584, 585*).

On general principles on the facts made on the moving affidavits, the injunction should be maintained against the defendants. (*See the principles laid down and cases cited in Phoenix agt. Commissioners of Emigration, 1 Abb. Pr. 466; same case on appeal, 12 How. Pr. R. 1; Brown agt. The Mayor, &c., 3 Barb. 254.*)

III. The plaintiffs are properly united in this action. (*See Peck agt. Elder, 3 Sand. S. C. R. 126; Brady agt. Weeks, 3 Barb. 157; Brown agt. Mayor, Id. 254.*)

IV. The metropolitan board of health cannot, on the premises in question, or elsewhere, claim or exercise the right of receiving or detaining persons or property, the subject of quarantine. Quarantine operations are by the statute above referred to, to be conducted and controlled solely by the commissioners of quarantine, and by the statute creating the board of health. Such jurisdiction is expressly reserved by

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the health officer and quarantine commissioners (*Laws of 1866, ch. 74, § 15.*)

V. The reception and detention of persons arriving from sea on infected vessels, and who have been exposed to quarantinable disease, and are detained by reason of such exposure and the consequent danger of the development in them of quarantinable disease, is as much a part of quarantine and quarantine operations, as the care or treatment of persons actually sick with such disease, and is equally to be confined within the locality which the quarantine laws prescribe for the carrying on of quarantine operations, to wit: "*at least two miles from the shore of Staten Island.*"

VI. If it be claimed that the passengers from infected vessels are to be discharged from quarantine jurisdiction, and on being landed on Staten Island, within the metropolitan police district, come within the jurisdiction of the board of health, and may be disposed of by them where they see fit, under the plenary powers conferred upon them by the act creating them, we say that such a claim is a mere evasion of the quarantine law, and cannot be sustained. It would be merely an attempt to transfer quarantine jurisdiction, which (*see supra, point IV*) the law says shall not be transferred.

The powers granted to the board of health are to be exercised in case of epidemic disease *arising and existing within the metropolitan police district*, and are not intended to cover, and do not cover or affect persons arriving from sea, who are solely subject to quarantine jurisdiction.

GEORGE BLISS, JR., *and*

CHARLES TRACY, *for Board of Health.*

The officers and boards that are concerned in protecting the state from the introduction of disease by means of vessels and persons arriving at New York, are:

1. The health officer of the port, whose duty it is to visit every vessel arriving, to send the sick (if any) to the floating hospital, or other place provided in accordance with law, and

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to take general charge of all vessels arriving with disease on board. (*Laws of 1863, chap. 358; 1865, chap. 613; 1866, chap. .*)

2. The quarantine commissioners, who are a board of appeal from the health officer, and who are also required by law to perform certain duties in procuring proper buildings, &c (*Id*).

3. The commissioners of emigration, who, have certain duties in connection with all persons who are not citizens, whether sick or well.

4. The metropolitan board of health, whose duty it is to provide for the protection of the health of the inhabitants of the metropolitan police district, comprising the counties of New York, Kings, Richmond, Westchester, and part of Queens.

The last named board derives its powers from chapters 74 and 686 of the laws of 1866, and at the present time especially, also from the proclamations issued under section 16 of chapter 74, copies of which are annexed to the affidavit of defendant Schultz.

Acting under the powers conferred upon them, the board of health has hired certain property known as the candle factory, at or near Seguine's Point, and has occupied certain other property adjoining, belonging to the state. In both cases they occupy these by permission and with the approval of the owners, and they had before this action was commenced incurred considerable expenses and many liabilities. They are acting with the approval, and so far as necessary in concert with the other boards.

An injunction is brought against them to forbid them from using what is for the purposes of this action their own.

It is alleged they *intend* so to use it, that it will be a nuisance to the people of the vicinity, and incidentally of Richmond county generally; and this nuisance is described in the complaint and affidavits (folio 11) as consisting in the proposed occupation of the premises "for the reception and care of patients, persons, clothing and baggage," from vessels under quarantine infected with cholera and other quar-

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antinable diseases, and from the floating hospital ships," and (folio 12) that it is intended to "establish and maintain hospitals and other buildings, and the appurtenances thereto, for quarantine purposes, and establish and maintain a quarantine establishment on the premises."

This proposed use, it is alleged (folio 13), is "wholly unjustifiable and unlawful, and contrary to law. It will, it is averred, be ruinous to the property and pecuniary interests" of the plaintiffs and others situated like them, will greatly depreciate their property and "greatly endanger (folio 15) the lives and health" of a large population, and "would be like to introduce and to cause the introduction of pestilence, and contagious and infectious disease among said population and among the plaintiffs and their families."

The injunction asked is, to forbid the bringing to the premises of any persons, baggage, clothing or other material matter or thing, the subject of quarantine, brought or landed from on board of any floating hospital * * * or any vessel * * * under quarantine," or "any person, matter or thing infected with any infectious or contagious disease, the subject of quarantine," or from using the premises "as a hospital or hospitals, or building or buildings for quarantine purposes, or for the reception, care or treatment of sick persons or other persons from the floating hospitals or vessels quarantined, or "who may have been exposed to any such infectious or contagious disease." An injunction is also asked against maintaining any quarantine establishment or buildings, or operations.

The affidavits submitted in reply, show that the plaintiffs have erected a fabric from their brains which has no foundation save in their fears. All that is proposed by the board of health is, to use the premises as a place for the temporary observation of persons who have arrived on vessels on which cases of cholera have occurred; persons whom the health officer may feel obliged, from the limited convenience at his control, to allow to pass from quarantine and to mingle with the community, but whom the board of health deems it for the general interest to keep under observation for a time;

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that no such persons are under any circumstances to be landed; that no one who has been exposed to any disease other than cholera, is to be landed; that a guard is to be kept round the premises, which are surrounded by a high board fence, and that practically, there are no inhabitants within half a mile of the place, and actually none at all within 1,500 feet.

The board of health proposes to use its own land for this purpose, and they do this in discharge of the duty imposed on them, to care for the health of not only New York, Kings and Westchester counties, but for Richmond county; and the measures they have adopted are, in their opinion, the best possible for that end.

Section 15 of chapter 74 of the Laws of 1866, requires the board of health, the health officer and the quarantine commissioners, to "co-operate together to prevent the spread of disease, and for the protection of life, and for the promotion of health."

By section 17 the board of health is required to "use all reasonable means for ascertaining the existence and cause of disease, or peril to life or health, and for averting the same throughout said district." By the same section they are authorized to exercise extraordinary powers, when there is imminent peril by reason of impending pestilence, which has been legally declared to be the case now.

The question now presented is in brief, will the court interfere with this board thus performing its duties in connection with others?

In endeavoring to furnish an answer to this question, we present the following points:

I. There is every presumption in favor of the legality and correctness of the action thus taken by public officers in the performance of their duty, and they can only be interfered with, in case their acts are clearly shown to be illegal.

II. Regarded independently of the statute law of the state, there is nothing in the proposed use of the premises that can justify the interference of the court.

1. The proposed use of the premises is not such an use as

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is known to the law as a nuisance. (*Phoenix agt. Commissioners*, 1 *Abb.* 466 ; *S. C. on Appeal*, 12 *How.* 1.)

2. While injunctions are sometimes granted before judgment, to prevent the creation of anything known to the law as a nuisance, even that is done with extreme reluctance, and a preliminary injunction is *never* granted to prevent the establishment of a thing not in itself noxious, except in cases in which it is conclusively shown that the thing sought to be enjoined will necessarily be a nuisance, and furthermore that it is a marked and imperative case of imminent and irretrievable danger and injury. (*Phoenix agt. Commissioners*, 1 *Abb.* 466 ; *S. C. on Appeal*, 12 *How.* 1 ; 6 *Paige* 554 ; *Tichner agt. Wilson*, 4 *Halst. Ch.* 197 ; *Earl of Ripon agt. Hobart*, 1 *Coop. Sel. Cas.* 333 ; *S. C.* 3 *Mylne & Keen*, 119 ; *S. C.* 8 *Condensed English Ch.* 332, 469 ; *Attorney General agt. Chaver*, 18 *Vesey*, 211 ; *Barnes agt. Baker, Ambler*, 158 ; 3 *Atk.* ; *Haines agt. Taylor*, 10 *Beavan*, 75 ; *White agt. Cohen*, 19 *Eng. Law and Eq.* 149 ; *Attorney General agt. Sheffield Gas Co. Id.* 641.)

3. The court certainly cannot say, upon any evidence before it, that on the principles laid down in these cases a case for preliminary injunction is made out.

III. There is nothing in the proposed use of the premises that is forbidden by the statute law of the law of the state. The only statutes alleged to bear upon the question at all, are the quarantine acts. (*Laws of 1863, chap.* 318 ; *Laws of 1865, chap.* 613 ; *Laws of 1866, chap.* .)

Of these, the law of 1863 is the one really applicable. The law of 1866 relates to a permanent quarantine to be established upon the west bank, and leaves the other provisions of the law of 1863 in full force.

1. The only thing expressly forbidden to be done by these statutes is, the construction of "warehouses, wet docks and wharves, with appropriate appurtenances for unloading and storing cargoes" (*Laws of 1863, chap.* 358, § 3). Inferentially also the establishment of a permanent quarantine hospital, is perhaps forbidden on Staten Island by the laws of 1863 and 1866.

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IV. The proposed use of the premises is directly authorized by virtue of the act establishing the board of health, without reference to any other act. (*Laws of 1866, chap. 74, § 16; Resolutions of Board of Health approved by Governor, Exhibit B, to affidavit of Schultz.*)

V. The injunction heretofore granted must be dissolved. (*Belcher agt. Farrar, 8 Allen, 325, 327, 329; People ex rel. Savage agt. Board of Health, 33 Barb. 344.*)

HENRY W. JOHNSON, and

HENRY C. MURPHY, for Commissioners of Quarantine.

I. But two grounds are assigned or suggested in the complaint and affidavits for granting the injunction prayed for. They are the following :

1. That the use of the premises described in the complaint for the purposes therein stated, will be ruinous to the property and pecuniary interests of the plaintiffs, and of all other persons similarly situated and owning property, or residing in the vicinity of said premises.

2. That the use of said premises for said purposes, would greatly endanger the lives and health of the population in the vicinity of said premises, and would be likely to introduce and cause the introduction of pestilence and contagious and infectious diseases among said population.

II. The injunction clearly ought not to be granted upon the first ground assigned in the complaint ; because—

1. If the use of the premises in question for the purposes stated in the complaint would, in fact, result in the pecuniary loss and injury which the plaintiffs allege, they have an ample remedy at law to recover their damages in case the defendants are acting without lawful authority.

2. Where a party has an adequate remedy at law by an action to recover damages, a court of equity will not grant relief by injunction. (*Watson agt. Hunter, 5 Johns. Ch. 169; Thompson agt. Mathews, 2 Edw. 212; Del. and Hudson Canal Co. agt. The N. N. & E. R. R. Co. 9 Paige, 323; Ben-*

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ton agt. *City of Brooklyn*, 15 Barb. 375 ; *Barnes agt. McAllister*, 18 How. Pr. R. 534.)

3. It is not alleged or suggested that the defendants are irresponsible and unable to respond in damages, and therefore the court cannot assume that the plaintiffs could not be fully compensated for their loss in an action to recover damages.

III. The injunction ought not to be granted upon the second ground above stated, for the following, among other reasons :

1. The substance of that ground for granting the injunction is, that the use of the property for the purposes stated, will result in the creation of a *public nuisance* detrimental to the public health.

2. According to the complaint, the premises are to be used for *quarantine purposes* and as a part of the *quarantine establishment*. If used for such a purpose, the court cannot assume that a public nuisance will be created thereby. A quarantine establishment is not a nuisance *per se*, and has never been held to be such. If rightly and properly conducted it would be entirely harmless, and the court cannot assume that a quarantine upon these premises would be improperly conducted.

3. To justify the granting of an injunction to restrain the commission of an act on the ground that it will create a nuisance, it must appear that the act will necessarily result in creating that which was known to the common law as a nuisance, or is declared by statute to be such. (*Phoenix agt. The Commissioners of Emigration*, 1 Abb. 467 ; *Wetmore agt. Atlantic White Lead Co.* 37 Barb. 70.)

4. The use of these premises for quarantine purposes is nowhere prohibited by law, and on the contrary it is directly sanctioned by law in case the quarantine authorities deem such use necessary for the protection of the public health. The commissioners and health officer are vested with large discretionary powers in reference to persons under quarantine, and the act complained of would be clearly within the

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scope of their discretion. (*See Laws of 1863, p. 578, § 24; p. 584, § 37; p. 586, § 47.*)

5. An act which has the sanction of law, and is performed under legal authority, cannot be a public nuisance. (*Harris agt. Thompson, 9 Barb. 350; Plant agt. Long I. R. R. Co. 10 Barb. 26; Leigh agt. Westervelt, 2 Duer, 618; Davis agt. The Mayor, &c., 14 N. Y. 506.*)

6. The plaintiffs claim no ownership in or right to any part of the premises proposed to be used as stated in the complaint. If any injury results to them from the acts complained of, it will flow from an exercise of legislative authority in a matter over which the legislature had full control. Its will in all matters affecting the public health and general welfare is supreme, and cannot be questioned in a suit by a private individual. (*Wynehamer agt. The People, 3 Kern. 411; The People agt. Toynbee, 2 Parker C. R. 490; The Same agt. Draper, 15 N. Y. 532; 1 Kent's Com. 448, 449, mar. p.*)

IV. But the injunction should be denied for another reason, and that is that the premises are not to be used for any such purpose as is stated in the complaint.

The affidavits of all of the quarantine commissioners and of the health officer, all concur in the fact that there has never been any intention on the part of the quarantine authorities to use the premises for any other purpose than as a place for the detention of well passengers. And they all concur in the opinion that such use would be unattended with any injury or danger to the plaintiffs, or to any other person or persons. The affidavits of the physicians which have been read on the part of the plaintiffs, can have no weight against these opinions, because they are given upon a very different statement of the purposes to which the premises are to be appropriated.

V. For the reasons above assigned, the motion for a permanent injunction should be denied, and the temporary injunction should be dissolved.

J. F. BARNARD, J. The subject of quarantine is carefully

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regulated by statute. It is determined by law what diseases are subject to quarantine, of what the quarantine establishment shall consist, and where its operations shall be carried on. This establishment consists first of "warehouses, wet docks and wharves." These are required to be "in the lower bay of New York, not on Staten Island, Long Island or Coney Island." The second part of such establishment is "anchorage for vessels," and "this shall be in the lower bay, distant not less than two miles from the nearest shore."

The third is a "floating hospital," and this "shall be anchored in the lower bay, not less than two miles distant from the nearest portion of the quarantine anchorage and from the nearest shore." The fourth is a "boarding station," and this is directed to be the present floating hospital, and such other vessels as may be provided to be anchored so near the hospital as to offer the greatest dispatch in boarding vessels. The fifth is a burying ground which is located on the lands of the state at Seguine's Point, and last, the establishment consists of residences of officers and men not located by the act. On an arrival of infected vessels the sick are to be immediately transferred to the floating or other hospitals to be provided, and full power is given "to appropriate vessels for the service of the sick."

The well persons are to be set at liberty as soon as they may be with safety. All vessels, the subject of quarantine, shall anchor within the quarantine anchorage, "and there remain with all persons arriving thereon," until discharged by proper authority. The quarantine establishment is put under the control of the commissioners of quarantine, and their powers are not subject to the metropolitan board of health. General power is given the commissioners of quarantine to take all means necessary for the protection of the public health, according to the exigencies of the case, provided they are not inconsistent with the above provisions.

It seems quite clear, from these minute directions, that the legislature intended that Staten Island should not be a place where any operation of quarantine, except to bury the dead, should be carried on.

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The very act establishing the present quarantine directed the land of the state at Seguin's Point to be sold without unnecessary delay, and the proceeds of such sale to be applied to the expenses of this quarantine as now established.

In violation of the law thus clearly expressed, the defendants, the commissioners of quarantine, or the defendants, the metropolitan board of health, or both jointly, claim the right and threaten to remove from the vessels which are the subject of quarantine, persons in whom there is no present manifestation of disease, in order that such persons may be detained at Seguin's Point, until time shall disclose whether they have the seeds of pestilence in them or not. This is purely and simply quarantine, and may not legally be done on Staten Island.

The plaintiffs make a case which, under well settled equitable principles, entitles them to an injunction restraining the defendants from committing the threatened acts, which, by law, they have no right to commit during the pendency of the action.

SUPREME COURT.

CHARLES C. WARD, Assignee, &c., respondent, agt. JOHN C. BENSON, appellant.

A cause of action in *trover* is *assignable*; and the assignee can sue in his own name.

Where personal property has been wrongfully taken and converted by a defendant, the *general assignee* of the owner may maintain an action for such conversion against the defendant, although the property was taken from the defendant in another state under an attachment in favor of the creditors of the owner, before the *general assignment* was executed by the owner.

The defendant was entitled to set up the amount for which the property was sold upon the attachment, as a defense to that amount. If the property was sold much below its actual value, the defendant, being the wrong-doer must suffer the loss of the depreciation.

The rule of *damages* in such a case, is ascertained by showing what the property was actually worth at the time of the taking and conversion, and deducting therefrom the amount for which it was sold on the attachment.

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New York General Term January, 1866.

Before INGRAHAM, F. J., CLERKE and BARNARD, Justices.

M. B. STAFFORD & Co., the plaintiff's assignors, were the owners of certain silk in Patterson, N. J., which, it is alleged in the complaint, was unlawfully converted by the defendant. This was on the 13th December, 1859.

On the 23d February, 1860, said Stafford & Co. made a general assignment to the plaintiff for the benefit of their creditors.

On the 13th January, 1860, an attachment was issued at the suit of Nathaniel Lane, a creditor of the assignors, and the silk above mentioned was taken from the defendant by the sheriff of Passaic county, sold at public auction, and the proceeds distributed among the creditors of M. B. Stafford & Co., the assignors.

The attachment under which the property in question was taken, was issued by and under the advice of the assignors, before their assignment to the plaintiff.

The court was requested to charge the jury, "that the property mentioned in the complaint having been taken from the defendant under process of law, in New Jersey, before Stafford & Mott transferred the same by their assignment to the plaintiff, he, the plaintiff, is not entitled to recover the property, or the value thereof."

The court was also requested to charge, that the plaintiff had failed to prove more than nominal damages.

The court refused to charge either of the requests, and the defendant excepted.

The court charged that the taking of the property by the sheriff, was a defense to the extent of \$1,883.41, being the proceeds of the sale under the attachment, and which sum was applied to pay Stafford & Mott's debts.

To this defendant excepted.

C. BAINBRIDGE SMITH, *attorney and counsel for defendant and appellant.*

First. The action cannot be maintained. It is in the

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nature of trover. The property sued for was not in the defendant's possession at the time of the assignment to the plaintiff, but had been seized under an attachment issued in favor of the assignors' creditors, and taken out of the defendant's possession and placed in the custody of the law at the instigation and request of the assignors; and there being no allegation or proof that the property had been impaired or diminished in value by the defendant while in his possession, the action for the mere taking, whether tortious or not, is not assignable.

Assignment to plaintiff, 23d February, 1860.

Seized under attachment, 13th January, 1860.

At the request of assignors. (*The People* agt. *Tioga Com. Pleas*, 19 *Wend.* 73; *McKee* agt. *Judd*, 2 *Kern. R.* 625; *Hall* agt. *Robinson*, 2 *Comst.* 293; *Gardner* agt. *Adams*, 12 *Wend.* 297; *Somner* agt. *Wilt*, 4 *Serg. & Raw.* 19, 28; *Willard's Eq.* 462; 2 *Story's Eq.* § 1040; *Sherman* agt. *Elder*, 24 *N. Y. R.* 622; *Stewart* agt. *Martin*, 16 *Verm.* 402; *Pierce* agt. *Benjamin*, 14 *Pick.* 356; *Prescott* agt. *Wright*, 6 *Id.* 20; *Squire* agt. *Hollembach* 9 *Id.* 551; *Sherry* agt. *Schuyler*, 2 *Hill* 204 and note; *Higgings* agt. *Whitney*, 24 *Wend.* 379; *Otis* agt. *Jones*. 21 *Id.* 394; *Plevin* agt. *Henshall*, 10 *Bing. R.* 24; *Id.* 25 *E. C. L. R.* 17.)

1. In an action of trover, where the property has been redelivered before suit brought, the party from whom it was taken can recover nothing but nominal damages. (*Sedg. on Dam.* 3 ed. p. 518 [492]; *Murray* agt. *Barling*, 10 *J. R.* 172; *Reynolds* agt. *Shuler*, 5 *Cow. R.* 323.)

2. "The only modification that can be said to exist of this rule is, perhaps, in those cases where, intermediate the conversion and the return of the property claimed, special damage has been sustained by the plaintiff, and in such cases the special damage demanded must be distinctly alleged in the declaration." (*Sedg. on Dam.* 3d ed. p. 519 [492]; *Moon* agt. *Raphael*, 2 *Bing. N. C.* 310; *Id.* 29, *E. C. L. R.* 345.)

3. "As the law at present stands, there seems no warrant for a distinction between tortious conversions and *bona fide*

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takings, except so far as the malice goes to prove a conversion" (*Sedg. on Dam.* 3d ed. p. 521 [494]).

4. If the action could be maintained at all, the jury should have been instructed, as requested, that the plaintiff was not entitled to recover more than nominal damages. (*Pages* 31, 32, *fols.* 122, 123; *Cases above cited*; *Hopper agt. Higbee*, 3 *Zabriskie*, 324.)

Sec:nd. The assignors, before their assignment to the plaintiff, caused the property to be taken from the defendant under an attachment in favor of their creditors, and the proceeds thereof distributed among them (*Volenti non fit injuria*).

Third. The whole transaction took place in New Jersey, and by the laws of that state the plaintiff was not entitled to recover. (*Code of Pro.* § 426; *Hopper agt. Higbee*, 3 *Zabriskie*, 324.)

Fourth. The judgment should be reversed.

CHARLES MOTT, *attorney and counsel for plaintiff and respondent.*

First. The silk was finished December 10, 1859, and was the property of M. B. Stafford & Co. There were then 599 sixteen ounce pounds of it.

The value of it was fixed by Stafford at \$4,825, or fifty cents an ounce; and by Thorp, a witness of defendant, at forty-five to fifty cents an ounce, on December 12, 1859, as the market value. A computation will show that the jury found it to be worth forty-seven and a half cents an ounce. The seizure of the silk by defendant on Sunday, December 11, 1859, is both admitted and proved.

On December 12, 1859, a demand was made upon defendant by Stafford for the silk, which the defendant refused to give up.

Second. From what has been said, it appears that the cause of action which accrued to Stafford and Mott—for the seizure of the silk by defendant, was a trespass.

This cause of action for the taking and detention of the

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silk was assignable, and was duly assigned to plaintiff (*McKee* agt. *Judd*, 2 *Kern*. 622).

Third. The exceptions at folios 36-41 were not well taken.

1. The questions were immaterial—some of them palpably so. The immateriality of the others becomes apparent by the answer, folio 14.

2. The questions were put upon cross-examination, before plaintiff rested. A party has no right, before opening his case, to introduce it to the jury by cross-examining his adversary's witness. The proper time to put these inquiries, if they should then be deemed material, was after plaintiff had rested his case, when the defendant had a right to recall the witness for that purpose (1 *Greenleaf on Ev.* § 447, and cases cited).

3. If the exclusion of the evidence was error, it did no harm. But the questions were not finally excluded. The admission of the testimony was merely postponed by the court in the exercise of its discretion to a subsequent stage of the case.

Fourth. The exception upon the motion to dismiss the complaint, was not well taken. The taking was admitted. The possession, value and assignment, were proved. The ownership was both conceded and proved.

Fifth. The question remaining is, what amount of damages plaintiff can recover?

1. The silk was taken on Sunday, December 11, 1859, and has been withheld to the present time.

The two attachments subsequently procured by defendant were quashed.

The other attachment, and the only one not shown to have been set aside, is that of Lane, under which the silk was attached January 31, 1860, nearly two months after the seizure of it by defendant, and sold April 22, 1861, nearly a year and a half after the seizure, at auction, for \$1,883.41, and the proceeds paid to the creditors of Stafford & Mott, including defendant.

2. Upon the question of damages, the court charged the jury that, if the verdict should be for plaintiff, plaintiff was

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entitled to recover the value of the silk at the time of the taking, after deducting from it the sum which the silk sold for at the sale by the creditors in the attachment suit of Lane, and which was applied in payment and satisfaction to that extent of Stafford & Mott's debts, with interest.

3. The defendant has no cause to complain of the rule of damages.

1. To the time of Lane's attachment, nearly two months after the seizure, the detention was as unlawful as had been the taking.

To that time no legal measure had been adopted which can be pretended to justify the detention.

In any view of the case, plaintiff is entitled to recover, not merely nominal damages for the trespass, as claimed by defendant, but also damages for the loss of the property from the day of the taking, December 11, 1859, to the day of the attachment, January 31, 1860. The proceedings in Lane's attachment suit cannot be held to have any effect at a time when they had no existence.

2. The wrongful taking being proved, plaintiff should recover the market value of the property at the time of the taking, besides interest, unless the defendant is able to show that the goods, or the value of them at the time of the taking, have been restored and accepted.

It is not pretended that the silk was ever restored.

The attachment and subsequent proceedings in Lane's suit do not have the effect of a return and acceptance of the property itself, or the value of it at the time of the seizure upon the question of damages. The measure of damages is the market value of the silk on December 11, 1859. As found by the jury, this amounted to over \$4,500. The sale, by virtue of the proceedings in Lane's suit, April 22, 1861, was for only \$1,883.41. The whole effect of these proceedings was to apply to the use of Stafford and Mott \$1,883.41. But this was not a restoration of the value of the silk on December 11, 1859, but of the value of it on April 22, 1861. Even this was not the market value on that day, but the value at a legal sale in Passaic county, N. J., where there is

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no market, and hence no market value for sewing silk by the quantity of 600 pounds. The sum produced at this sale of the silk is proved to be less by several thousands of dollars than the market value of it December 11, 1859.

3. A tortious taker of property must indemnify the injured party for his loss. The measure of the loss in this case is the value of the property at the time of the taking in December, 1859, which is proved to be over \$4,500. The only compensation shown is the application, by process of law, to the owner's use of the sum of \$1,883.41. But compensation to the extent of \$1,800 is not an indemnity for the loss of \$4,500. The actual loss still remaining, is the difference between the value of the property in December, 1859, and \$1,883.41. (*Blake agt. Johnson*, 1 *N. H.* 91; *Lamb agt. Day*, 8 *Vt.* 407; *Pierce agt. Benjamin*, 14 *Pick.* 356; *Board agt. Head*, 3 *Dana, Ky.* 489.)

4. As the application of this sum to the use of Stafford and Mott was by process of law, it may be presumed that it was so applied with their assent. But it was no part of the proceedings in the suit of Lane to furnish an indemnity for the damages occasioned by the wrongful seizure of the silk by defendant, and no consent on their part, or on the part of plaintiff, that the proceedings should have that effect, can be presumed. The parties can be held to have assented only to the act of the law, and the legal proceedings did not restore the silk to the owners, or the value of it at the time of the seizure, but reduced their loss to the extent of \$1,883.41 only.

5. The loss having been diminished to the extent of \$1,883.41 only, to that extent only should the plaintiff's recovery be diminished.

To that extent only has defendant shown a right to mitigate the claim of this plaintiff for damages.

6. The attachment of the goods by Lane before the assignment of this cause of action, is a matter of no moment, the cause of action having accrued before the attachment. The plaintiff, by the assignment, took the cause of action, subject to the proceedings in Lane's attachment suit, which con-

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stitute not a complete, but a partial defense only, and go not in bar of the action but only in mitigation or reduction of plaintiff's damages (*Irish agt. Cloyes*, 8 *Vt.* 30).

Sixth. The rule of damages laid down by the court was more favorable than defendant was entitled to.

1. The sale and distribution in Lane's suit did not take place till after the commencement of this action.

2. The seizure and detention of the silk by defendant constitute an undisguised trespass, without color of permission or legal right.

For such wanton violation of the owner's rights, and the offensive manner accompanying it, the defendant ought not to be permitted to avail himself of the proceedings in Lane's suit to mitigate the plaintiff's damages at all (*Higgins agt. Whitney*, 24 *Wend.* 379).

Seventh. The case of *Hopper agt. Higbee* (3 *Zabriskie's N. J. Rep.* 342), which was read in evidence, was a very different case from this.

1. In that case the writ issued at the suit of the wrong doer; in this, at the suit of a third person—Lane.

The property, when attached, was taken, in that case, from the hands of the wrong doer; the defendant is shown to have parted with the possession of the property in question nearly two month's before Lane's attachment of it.

2. In that case, an offer was made, on behalf of defendant, to prove the application, by operation of law, to the owner's use of the property taken.

The plaintiff objected. The court sustained the objection, and the whole bill of exceptions is on that, except one technical point.

The question in that case, therefore, was as to the admissibility of the evidence only, not as to the effect of it; and the question as to the extent of the mitigation of the plaintiff's damages on account of such application of the property, was not in that case at all.

In this case, the evidence was admitted, and the question is as to the effect to be given to it; in other words, to

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what extent the plaintiff's damages should be reduced on account of it.

Eighth. The judgment and order appealed from should be affirmed.

By the court, CLERKE, J. The property, for the conversion of which this action is brought, was wrongfully taken by the defendant on the 11th of December, 1859. Attachments were issued against it while in the possession of the defendant, by creditors of the owners, on the 31st January, 1860, under which it was sold April 22, 1861, for \$1,883.41. On the 23d February, 1860, the owners made a general assignment to the plaintiff for the benefit of their creditors.

At the trial, the judge was requested to charge the jury, that the property mentioned in the complaint, having been taken from the defendant by process of law in New Jersey, before the owners transferred the same by their assignment to the plaintiff, the latter is not entitled to recover the property or the value thereof. The judge was also requested to charge, that the plaintiff had failed to prove more than nominal damages. He refused to charge as requested; but he did charge that the taking of the property by the sheriff was a defense to the extent of \$1,883.41, being the proceeds of the sale under the attachment, which were applied to pay the original owners debts. He was clearly right.

If the proposition of the defendant's counsel is tenable, if the property was, at the time of the wrongful taking, worth ten times the amount which it brought at the sale under the attachment, the wronged, and not the wrongful party, must suffer the consequences of the depreciation. The wronged, instead of the wrong doer, should suffer, according to this proposition, the direct consequences of the wrong. At the time of the conversion, and at any time between the conversion and the sale, it is possible that the state of the market might have enabled the owner to sell the property for a much larger sum than it brought at the sale under the attachment. But this he would have been prevented from doing by the unjustifiable act of the defendant. The judge properly charged,

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therefore, that the jury should determine, from the evidence, what was the actual value of the property at the time of the taking ; and, having ascertained this, he directed them, if they should find for the plaintiff, to deduct from this ascertained value, at the time of the taking, the amount which it produced at the sale. The other exceptions and objections of defendant's counsel, are equally untenable.

The judgment should be affirmed, with costs.

BUFFALO SUPERIOR COURT.

JANE F. DIBBLE agt. ALMON M. CLAPP and others.

The courts of this state have *no jurisdiction* over lands in this state purchased by the United States with the consent of and ceded by the state, for the erection of post-offices, custom houses, court rooms, forts, magazines, arsenals, dock yards and other needful buildings.

Congress is vested with the same exclusive jurisdiction over such places as it possesses over the District of Columbia, and the same results follow. Consequently the inhabitants of such places, *actually dwelling therein*, are not entitled to the exercise of the elective franchise at state elections, nor to the other political privileges exclusively belonging to the citizens of the state.

Nor have the courts of this state jurisdiction of an action of *ejectment* to recover *dower* in such lands, where the land was purchased by the United States from the husband of the claimant, and ceded by the state, while he was living, and the right of dower of the wife was *inchoate*.

It seems, that the act of the legislature of this state, giving the consent and ceding the lands to the United States, after such purchase, vested the fee of the *whole premises* in the United States, free from any claim of dower.

Buffalo Special Term July, 1866.

THIS is ejectment under the statute of this state for dower in certain lands, situate in the city of Buffalo, upon which stands the large and substantial stone building erected and used by the United States government for a post-office, custom house, court rooms, &c. The defendant Clapp is deputy postmaster, and has the charge of that part of the building used as a post-office. The defendant Norton is collector of customs, and has charge of that part of the building used as a custom house. The defendant Hall is U. S. district judge, and holds courts in the rooms set apart in the building for that pur-

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pose. The other defendants are U. S. deputy marshals, and occupy offices in said building appropriated to that use.

The United States in 1855 became, by purchase, seized in fee of the lands in question. They were purchased by the United States for the purposes for which they are now used. At the time of the purchase of the lands by the United States, the plaintiff had an inchoate right or possibility of dower in them. Her husband was then living; he died in the fall of 1864.

The state of New York gave its consent to the purchase of the lands by the United States for the purposes before mentioned, and ceded its jurisdiction in and over the said lands when purchased by the United States, to the United States, reserving the right to execute the process of the state upon said lands, except when such process might affect the real or personal property of the United States. (*Laws of 1854, chap 1; Laws of 1855, chap. 399.*)

B. H. AUSTIN, *for plaintiff.*

J. L. TALCOTT *and* R. L. BURROWS, *for defendants.*

MASTEN, J. The seventeenth subdivision of section eight of article first of the constitution of the United States, confers the power upon congress "to exercise exclusive legislation in all cases whatever over such district (not exceeding ten miles square), as may by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise the like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

Exclusive legislation is exclusive jurisdiction.

When land is purchased by the United States, for the purposes specified, with the consent of the state in which the land is situate, the land or territory so purchased falls, by force of the above quoted provision of the constitution, under the exclusive jurisdiction of the United States. The consent

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of the state to the purchase by the United States is a surrender or cession of the sovereignty of the state over such territory.

In the case of the lands in question, the state of New York not only gave its consent to the purchase of them by the United States, but also in express terms ceded its jurisdiction over them to the United States.

The object of the reservation by the state of the right to execute the process of the state upon the lands or territory ceded, was to prevent such territory from becoming a sanctuary for criminals and for debtors and their property.

The officers of the state, in executing such process under the reservation, act under the authority of the United States.

The state and its courts have no jurisdiction over crimes committed upon the ceded territory. They are committed against the peace and dignity of the United States and not of the state of New York. Except by force of the consent of the United States expressed in the reservation contained in the act of cession, neither the civil nor criminal process of the courts of the state could be executed upon the ceded territory, any more than they could be beyond the territorial limits of the state. Such ceded places probably are no part of the state, for it has no jurisdiction there. The inhabitants of such places, actually dwelling therein, are not entitled to the exercise of the elective franchise at state elections, nor to the other political privileges exclusively belonging to the citizens of the state.

The district of Columbia was ceded to the United States by the states of Maryland and Virginia, under the first branch of the provision of the constitution above quoted.

Congress has exclusive jurisdiction over that district and its inhabitants. That district forms no part of the states or of either of them by which it was ceded. The inhabitants of the district are not citizens of those states, nor enumerated as such, and are not entitled to the civil and political rights and privileges belonging exclusively to the citizens of those states.

These questions I regard as settled. They follow from the

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exclusive legislative jurisdiction—vested in congress. The “like authority” is vested in congress by the second branch of the provision of the constitution above quoted, over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts and other needful buildings. Congress is vested with the same exclusive jurisdiction over such places as it possesses over the District of Columbia, and the same results follow.

If judgment should be given for the plaintiff in this action, it would be that she recover her dower in the lands in question; that it be admeasured and that a writ of possession issue to put her into the possession of the part assigned to her. Such process would affect the property of the United States.

I am of the opinion that the courts of the state of New York have no jurisdiction over the lands in question. (1 *Kent's Com.* 402; 3 *Story on the Constitution*, 96; *State agt. Clary*, 8 *Mass. R.* 72; *State agt. Young*, 1 *Hall's Journal*, 47; *People agt. Godfrey*, 17 *Johns. R.* 225; *Untied States agt. Cornell*, 2 *Mason's R.* 60–91; *United States agt. Davis*, 5 *Mason's R.* 356; *United States agt. Ames*, 1 *Wood. and M.* 76; *Cohens agt. Virginia*, 6 *Wheat.* 424.)

It was contended that the United States not having purchased the right of the plaintiff in the lands in question, had not yet acquired jurisdiction over them, for the jurisdiction was ceded over them “when purchased by the United States.”

The United States, by purchase, acquired the fee of the lands from the persons seized in fee of them. The plaintiff at the time of such purchase, was a wife, not a widow, and her right to dower in the lands of her husband, was a mere possibility; it was not an interest in the lands; it could be released to one having an estate in the lands, but was not the subject of bargain and sale, or of grant or transfer.

I do not think that there is anything in this position taken by the plaintiff.

I think the graver question is, whether the plaintiff was not divested of this mere possibility by force of the act of

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the legislature of this state referred to, and the purchase by the United States.

This mere possibility depended upon law, and was within the power of the legislature.

The act gave the consent of the state that the lands might be purchased by the United States for the erection thereon of a custom house, post-office, &c., and enacted that "the said United States may have, hold, use, occupy and own the said lands when purchased."

The United States purchased them of the persons owning the fee, and representing every interest in them (*Moore agt. Mayor of New York*, 4 *Seld.* 110).

Having arrived at the conclusion that the complaint must be dismissed upon the ground that the courts of the state have no jurisdiction over the lands in question, it is not necessary to determine the right of the plaintiff to dower in said lands ; or whether the defendants are occupants within the meaning of the statute prescribing against whom ejectment must be brought.

The complaint is dismissed.

SUPREME COURT.

MILLARD P. FILLMORE as receiver of, &c., of CHARLES J. HUBBARD, *appellant* agt. CORNELIUS M. HORTON, *respondent*.

A receiver appointed in *supplementary proceedings*, does not acquire the legal title to the property of the judgment debtor until his *appointment as such receiver*. His title does not relate back to the time of the *service of the restraining order* in these proceedings, upon the judgment debtor.

Where a creditor by a *bona fide chattel mortgage*, sells the property of the judgment debtor, upon the mortgage, and delivers possession to the purchaser, *prior* to the appointment of a receiver in supplementary proceedings of the debtor's property, such mortgage sale does not constitute a *conversion* of the property as against the receiver, for which, as such, he can maintain an action.

It is only when the party has possession or control of the property, that a refusal to deliver, on demand, constitutes evidence of a conversion.

Eric General Term. November, 1865.

Fillmore agt. Horton.

Present, GROVER, P. J., DANIELS and MARVIN, Justices.

ON March 10, 1863, Hubbard executed and delivered to the defendant a chattel mortgage on the property in question, as a present and continuing security for advances to be made thereafter by the defendant.

In 1857, Absalom Bull recovered judgment against Hubbard, and July 7, 1863, commenced proceedings supplementary to the execution thereon, by the personal service of an order on Hubbard; which order contained a clause restraining and enjoining Hubbard from transferring or disposing of any of his property. During the pendency of these proceedings, and previous to the appointment of plaintiff as receiver of Hubbard's property, the defendant proceeded to sell the property on his mortgage, and purchased it himself, and resold it to Hubbard's wife. After plaintiff's appointment he demanded the return of the property, which was refused, and this action was brought for the conversion thereof. The action was tried before a referee, who reported that at the time of the sale by defendant his mortgage had not been paid, and dismissed the complaint, and plaintiff appealed. The legal question involved was, as to the time when the judgment creditor obtains a lien on the debtor's property by the proceedings supplementary to the execution.

GEO. W. COTHRAN, *for appellant.*

I. Upon recording the order appointing plaintiff receiver of Hubbard's property, he became vested with the property in question as of the time of the commencement of the proceeding in which he was appointed.

It is provided by section 298 of the Code, that the order appointing a receiver in supplementary proceedings, shall be recorded, and that the receiver "shall be vested with the property and effects of the judgment debtor from the time of the filing and recording the order."

The same section also provides that when the order requiring the debtor to appear and answer concerning his property is granted, "the judge may, by order, forbid a transfer or

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other disposition of the property of the judgment debtor." That was done in this case.

Prior to the amendment of 1862, the receiver succeeded to the debtor's rights of property on filing his bond. The amendment simply provides for recording the order of appointment, and that the receiver shall become vested from that time. Requiring such orders to be recorded, was for the benefit of other creditors, to furnish record evidence of what proceedings had been taken against the debtor. The effect of the restraining clause is left untouched by the amendment.

What force and effect are to be given to that clause authorizing the judge to enjoin a debtor from making any disposition of his property? Although this question has been incidentally before the courts, yet it has never, in any reported case, received that consideration to which its importance entitles it.

Unless the receiver, upon his appointment, and recording the order appointing him, becomes "vested" with all the property that the judgment debtor had *at the time of the service of the restraining order on him*, then the whole proceedings supplementary to the execution are a failure. To hold that the receiver simply becomes "vested" with what the debtor has *at the time of recording the order of appointment*, is to nullify the clause in question, and to permit debtor's to deal with their property as they choose, intermediate the service of the order and the appointment of the receiver.

The judgment creditor acquires a lien upon his debtor's property by the service of the order, which lien ripens into a perfect power of alienation, by the subsequent appointment of a receiver (*Edmonston agt. McLeod*, 16 N. Y. R. 543, 544).

In this case the court say, "by the commencement of the proceedings supplementary to execution against his judgment debtor, the plaintiff acquired an inchoate lien upon his interest, whatever that may have been, in the lot purchased of Woods. But to perfect this lien and secure the benefit of his proceedings, it was necessary that he should obtain

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an order under the 297 section of the Code, directing the property of his debtor to be applied in satisfaction of his judgment, and also procure the appointment of a receiver to carry that order into effect. Such orders would have the effect to divest the debtor of his interest in the property, and *to vest it in the receiver* for the benefit of the plaintiff."

In this case it was unnecessary to have procured an order under § 297, because there were conflicting claims to the property, and that section relates solely to property which is undisputedly the debtor's. The case in the court of appeals properly came within § 297.

If the service of the order did not create any lien upon the debtor's property, what possible benefit could a creditor acquire by virtue of these proceedings? It certainly suspended the debtor's power of disposing of his property, and the property became subject to the power and authority of the court. The law *appropriated* this property to the payment of the judgment sought to be enforced. By this I mean to the extent of the debtor's interest. Third parties rights, of course, must be respected.

This being a proceeding in an action based upon a judgment of the court, and in aid of the legal execution, instituted for the purpose of enforcing the judgment, the service of the order in legal effect amounts to an equitable levy. The proceeding is only available where the legal execution is ineffectual. Its purpose and object are to reach and render applicable to the satisfaction of a judgment, rights of property and equitable interests, which are not subject to levy and sale on an execution. The levy of an execution creates a lien upon property. This proceeding being in effect an equitable execution, the service of the order creates a similar lien upon the debtor's equitable interests that the levy of an execution at law does upon property, and the rights thus acquired are lost by abandonment in the same manner.

If I am correct in my position that the creditor does thus acquire a specific lien upon the debtor's property, then the conclusion inevitably follows that the receiver, upon his

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appointment, being the mere officer of the court to enforce the lien thus acquired, becomes vested with the property of the debtor as it was at the time this lien was acquired. He certainly could not become vested prior to his legal existence. The Code says, he shall become vested from the time of recording the order of his appointment. While this is true, there is nothing in that provision inconsistent with his then becoming vested, by operation of law, with all the debtor's rights of property that existed when the proceedings were commenced. How else shall this lien be enforced? The property of the debtor from that time having been in the custody of the court, the debtor having been restrained from disposing of it, does not the court place this property into the hands of its receiver just as it was when levied upon by the service of the order? The receiver's rights do relate back to that time. (2 *N. Y. Pr.* 106; *Rutter* agt. *Tallis*, 5 *Sandf.* 610; 3 *Bosw.* 550.)

There has been some criticism upon *Rutter* agt. *Tallis*, but without foundation, for the reason that the cases all arose under § 244 as to the appointment of receiver's as a provisional remedy. There is a wide difference between the levy of an equitable execution, based upon a judgment, and the notice of a motion for the appointment of a receiver in an action just instituted, while it is held that in the latter class of cases the receiver acquires no lien until his actual appointment as against *intervening judgment creditors*. (*Rutter* agt. *Tallis* is cited with approval; *Van Alstine* agt. *Cook*, 25 *N. Y.* 489, 496.) In that case, intermediate the appointment of a receiver, and his actual acceptance of the trust and filing his bond, a judgment creditor caused an execution to be levied upon the partnership property, and the question was who should have the proceeds of the property—the receiver or the sheriff? The court held that, as against the execution creditor, who was proceeding in a legal manner, and who had acquired the first specific lien, he was first entitled to his pay. It will be observed that this exception is in behalf of an *execution creditor*, not in favor of a purchaser with notice of the pendency of the proceedings, nor a person

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attempting to acquire title under an authority conferred by the restrained debtor, to wit, a defunct chattel mortgage.

The well settled rule in chancery was, "the receiver is, as between the parties to the suit, to be considered as appointed from the date of the order of reference to the master" (*Fairfield agt. Western, 2 Simons & Stuart Ch. R.* 96).

The order of reference in this case was dated July 7, 1863. Therefore, I insist, that as between the receiver and Hubbard, the receiver, on his appointment, succeeded to all Hubbard's rights of property as they existed when the order was served, which was July 7, 1863.

— — — — —, *for the respondent.*

By the court, GROVER, J. The plaintiff did not acquire the legal title to the property of Hubbard, the judgment debtor, until he was appointed receiver in the supplementary proceedings. This has been so decided by the court of appeals in a case not yet reported. The sale of the property by the defendant, upon the mortgage, was prior to that, as also his sale to Mrs. Hubbard. These sales cannot, therefore, constitute a conversion of the property as against the plaintiff, for which, as such, he can maintain an action.

By the appointment of the plaintiff as receiver, not only the goods and chattels of the debtor vested in the plaintiff, but also his choses in action. It follows that if the defendant had converted Hubbard's property prior to the appointment of the plaintiff, the right of action would have vested in the plaintiff, and he could have maintained an action therefor.

It would, perhaps, be a sufficient answer to any claim of the plaintiff founded upon this ground, that the plaintiff has not, in his complaint, counted upon any such cause of action. It is true, that if the sales upon the mortgage and by the defendant to Mrs. Hubbard, were mere shams, so as not to transfer any title to the property as between the parties, but leave it remaining in the defendant, then the refusal to deliver the property by the defendant to the plaintiff, upon

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demand, after the appointment of the plaintiff as receiver, would be sufficient proof of a conversion of the plaintiff's property. But no evidence tending to show that the sale from the defendant to Mrs. Hubbard was not a valid one between the parties, was given. The defendant had not only sold the property, but delivered it to the purchaser, and completely divested himself of possession before the demand was made. Under this state of facts, the neglect or refusal of the defendant to deliver the property on demand, was no evidence of a conversion. It is only when a party has the possession or control of property that a refusal to deliver upon demand constitutes such evidence.

Whether the objection was taken upon the trial that the plaintiff could not recover for a conversion of the property while the title was in Hubbard, does not appear in the case. From the opinion of the learned referee, it appears that the right of the plaintiff to recover upon that ground was considered by him. The question whether there had been a conversion as against Hubbard, depended upon the question whether there was anything due upon the mortgage at the time of the sale of the personal property made by virtue of it by the defendant. This question has been fully discussed by the referee, and I think his conclusion thereon correct. This being so, there is no reason to reverse the judgment.

It should, therefore, be affirmed with costs.

BUFFALO SUPERIOR COURT

ABRAHAM J. HEINEMAN agt. THE GRAND TRUNK RAILWAY
COMPANY OF CANADA.

Railroad corporations, engaged in the transportation of property, are subject to the absolute responsibility, which by the common law, rests upon *common carriers*; they are, except as against loss or injury occasioned by the act of God, or of a public enemy, *insurers* of the safe transportation and delivery of the property intrusted to them for carriage.

Common carriers cannot, by contract, shield themselves from liability for their own fraud, or their own willful act or negligence; but they may contract against

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liability for that low degree of negligence or want of care on their part which is not equivalent to willful or wanton neglect of duty or recklessness.

Common carriers may also by *special contract* relieve themselves from all responsibility for injury to or loss of the property intrusted to them for carriage, occasioned by the *negligence, misconduct, fraud or felony* of their *employees or servants*.

Where the plaintiff signed a special contract made by the defendants as common carriers, in which was a clause that "the owner of the within mentioned animals undertakes all risk of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise," and by which contract the defendants undertook to transport for the plaintiff from Stratford, in Canada West, to Buffalo, in this State, a car load of horses, and, as the plaintiff alleged, the defendants carelessly, negligently, wrongfully and willfully, run the car containing the horses on to a side track of its road, and kept them locked up for four days and nights without food or drink, and by its agents refused to permit them to be unloaded so that they could be fed—it being impossible to feed them in the car; by reason whereof the horses were nearly starved to death and thereby rendered comparatively valueless.

Held, that an action by the plaintiff against the defendants for damages by reason of such negligent, wrongful and willful acts, could not be sustained. The plaintiff was properly *non-suited* (VERPLANCK, *J. dissenting*).

Argued June General Term, 1866, and decided September 4, 1866.

Before VERPLANCK, P. J., MASTEN and CLINTON, Justices.

THIS action was brought to recover damages for injuries sustained by a car load of horses while being transported by the defendant for the plaintiff from Stratford, in Canada West, to Buffalo, in this state, under a special agreement. It is charged in the complaint that the defendant "carelessly, negligently, wrongfully and willfully," run the car containing the horses in question on to a side track of its road, and kept them locked up for four days and nights without food or drink, and by its station agent (no other person representing the company being present), refused to permit them to be unloaded so that they could be fed, it being impossible to feed them while in the car.

On the trial, the defendants' incorporation was admitted, and that it was engaged in transporting live stock from Stratford, C. W., to Buffalo. The plaintiff proved and put in evidence the contract under which the horses were shipped, which is as follows :

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the legislature of this state referred to, and the purchase by the United States.

This mere possibility depended upon law, and was within the power of the legislature.

The act gave the consent of the state that the lands might be purchased by the United States for the erection thereon of a custom house, post-office, &c., and enacted that "the said United States may have, hold, use, occupy and own the said lands when purchased."

The United States purchased them of the persons owning the fee, and representing every interest in them (*Moore agt. Mayor of New York*, 4 *Seld.* 110).

Having arrived at the conclusion that the complaint must be dismissed upon the ground that the courts of the state have no jurisdiction over the lands in question, it is not necessary to determine the right of the plaintiff to dower in said lands ; or whether the defendants are occupants within the meaning of the statute prescribing against whom ejectment must be brought.

The complaint is dismissed.

SUPREME COURT.

MILLARD P. FILLMORE as receiver of, &c., of CHARLES J. HUBBARD, *appellant* agt. CORNELIUS M. HORTON, *respondent*.

A receiver appointed in *supplementary proceedings*, does not acquire the *legal title* to the property of the judgment debtor until his *appointment as such receiver*. His title does not relate back to the time of the *service of the restraining order* in these proceedings, upon the judgment debtor.

Where a creditor by a *bona fide chattel mortgage*, sells the property of the judgment debtor, upon the mortgage, and delivers possession to the purchaser, *prior* to the appointment of a receiver in supplementary proceedings of the debtor's property, such mortgage sale does not constitute a *conversion* of the property as against the receiver, for which, as such, he can maintain an action.

It is only when the party has possession or control of the property, that a refusal to deliver, on demand, constitutes evidence of a conversion.

Eric General Term. November, 1865.

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Present, GROVER, P. J., DANIELS and MARVIN, Justices.

ON March 10, 1863, Hubbard executed and delivered to the defendant a chattel mortgage on the property in question, as a present and continuing security for advances to be made thereafter by the defendant.

In 1857, Absalom Bull recovered judgment against Hubbard, and July 7, 1863, commenced proceedings supplementary to the execution thereon, by the personal service of an order on Hubbard; which order contained a clause restraining and enjoining Hubbard from transferring or disposing of any of his property. During the pendency of these proceedings, and previous to the appointment of plaintiff as receiver of Hubbard's property, the defendant proceeded to sell the property on his mortgage, and purchased it himself, and resold it to Hubbard's wife. After plaintiff's appointment he demanded the return of the property, which was refused, and this action was brought for the conversion thereof. The action was tried before a referee, who reported that at the time of the sale by defendant his mortgage had not been paid, and dismissed the complaint, and plaintiff appealed. The legal question involved was, as to the time when the judgment creditor obtains a lien on the debtor's property by the proceedings supplementary to the execution.

GEO. W. COTHRAN, *for appellant.*

I. Upon recording the order appointing plaintiff receiver of Hubbard's property, he became vested with the property in question as of the time of the commencement of the proceeding in which he was appointed.

It is provided by section 298 of the Code, that the order appointing a receiver in supplementary proceedings, shall be recorded, and that the receiver "shall be vested with the property and effects of the judgment debtor from the time of the filing and recording the order."

The same section also provides that when the order requiring the debtor to appear and answer concerning his property is granted, "the judge may, by order, forbid a transfer or

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being detached from the stock cars, was hitched, and proceeded to Buffalo, leaving the cars laden with live stock, including the car containing plaintiff's horses, standing upon the switch or side track, at Brantford aforesaid, until between 10 and 11 o'clock on the morning of the 18th March, when the cars laden with stock, including the car containing plaintiff's horses, were sent by defendant to Buffalo, arriving at that place on the 19th day of March, about noon, when defendant delivered said horses to plaintiff—they having been without food or drink since they were loaded at Stratford aforesaid.

That while said car, containing plaintiff's horses, remained standing on the side track at Brantford, and soon after the arrival of the train from Stratford, all the employees of defendant, who had been connected with this train departed, none of them remaining in charge of the live stock, except that there remained at Brantford a local yard master, and a local station agent, employees of defendant.

That other trains afterwards arrived at Brantford, from points west of Brantford, composed of cars loaded with produce, and others loaded with live stock, all of which trains, on their arrival, were broken up by defendant's employees, and the cars containing live stock were placed on side tracks of defendant's road, while the cars containing dead freight and produce, were made up into new trains and sent on from Brantford to Buffalo by defendant's employees. That while the cars containing plaintiff's horses, remained at Brantford, a large number of trains loaded with dead freight and produce, estimated at from ten to fifteen trains, came from points west of Brantford, on defendant's road, and passed by the car containing plaintiff's horses while standing on the side track, and went on towards Buffalo.

That while thus detained at Brantford, plaintiff frequently, on the 17th and 18th days of March, applied to the yard master at Brantford aforesaid, and to Mr. Evans, the station agent at Brantford, to have the car containing plaintiff's horses unlocked and unloaded, to the end that the horses could be properly fed and watered, as they could not be fed

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and watered while in the car, which the said agents of defendant declined to do, or permit to be done.

That plaintiff could have no access to his horses while locked up in the car, and until they were delivered in Buffalo.

That by reason of being detained without food or drink, and by and through the gross and culpable negligence and misconduct of the servants of the defendant having charge of the defendant's trains and stations upon that branch of the defendant's road, the said horses were damaged to the amount and in the manner stated in the complaint, i. e. nearly starved to death and rendered nearly valueless.

The usual time of running stock cars from Stratford to Buffalo over defendant's road, was from 24 to 26 hours.

The plaintiff thereupon rested his case.

Defendant's counsel moved the court for a nonsuit.

The court decided that the liability of the defendant must be determined by the laws of the state of New York, and granted the motion, and plaintiff's counsel duly excepted.

And the court directed the exceptions to be heard at the general term in the first instance, and until the hearing and decision thereof that the entry of judgment be stayed.

MANN & COTHRAN, *attorneys, and*
GEO. W. COTHRAN, *counsel for plaintiffs.*

I. The special contract does not exonerate the defendant from damage to plaintiff's horses occasioned by the negligence or misconduct of the defendant's servants or agents. (*Wells agt. The Steam Navigation Co. 4 Seld. 375; Powell agt. Penn. R. R. Co. 32 Pa. State R. 414; Goldey agt. Penn. R. R. Co. 6 Casey's Pa. R. 242.*)

1. The defendant is a common carrier, and may lawfully contract for a restriction of, or exemption from some of its common law liabilities.

How far, and as to what particular liabilities, has the defendant relieved itself by the contract in question? which is as follows; "The owner * * * undertakes all risk of

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loss, injury, damage and other contingencies, in loading, unloading, conveyance or otherwise;"

That the plaintiff never intended to confer upon the defendant, and that the defendant did not seek to have the right conferred upon it to starve these horses, is manifest upon the face of the contract. It is apparent that no such contingency was contemplated by the parties.

Both parties were undoubtedly aware that a variety of accidents might, and frequently do happen, in loading, unloading and conveying live stock, for which the defendant would be liable to respond in damages, such as arise from the accidental displacement of a rail in the track; the breaking of a car wheel and other similar causes; in other words, the ordinary incidents of railroad conveyance; and it was as against injuries sustained from such causes that the plaintiff agreed to assume the risk. To hold that the plaintiff assumed the risk of loss, injury or damage occasioned by some extraordinary event, clearly not contemplated by the parties when the contract was made, and that too transpiring while the horses were neither being loaded, conveyed or unloaded, but while standing on a side track of defendant's road, is to make a contract for the parties, and not to place a construction upon the contract which they have made.

2. This clause relates solely to accidents and casualties happening without the negligence or misconduct of the defendant or its employees. It has nothing to do with damages arising from negligence or misconduct. Those words do not occur in it; nor is there a word in it from which it can be even inferred that the defendant has exonerated itself from damages thus occurring. The plaintiff has in no way waived his right to ask the defendant to respond in damages for injuries caused by the negligence or misconduct of defendant or its employees.

The contract itself furnishes indubitable evidence of this.

The third paragraph, by which the defendant sought exemption from liability to persons riding on free passes, in express terms exonerates the defendant from responsibility

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for injuries occurring by means of the "negligence, default, misconduct or otherwise, on the part of the company, &c."

It is a well understood principle in the construction of contracts, that where a party seeks exemption from liability in reference to several subjects embraced within the same instrument, and the exemption is expressly made as to one of the subjects, and is omitted as to the other subjects, and the different subjects are entirely distinct from and independent of each other—the fact that this exemption is thus made in one case, and not in the others, excludes the idea that such exemption was sought, intended or made, as to the other subjects.

If the defendant had intended to have relieved itself from liabilities in loading, unloading and conveying these horses, resulting from the same causes, particularly specified in the third paragraph, it would have employed the same or synonymous terms in creating this exemption; and the fact that it did not, is conclusive that no such exemption was intended or made. Why make this express exemption in the one case and not in the other, if a distinction was not intended to be made between the two cases?

It is well known that every time one of these contracts are foisted upon a person by a railroad company, that the company is guilty of a moral fraud. These contracts are in the highest degree coercive. The community, especially in Canada, is at the mercy of these corporations. The companies say sign that contract, or we will not take your property, and the party has no other alternative but to sign and take the chances. Were he to sue the company for refusing to receive his property, the company would be ready with a defense of some kind, for whoever knew of an instance where such a company was ever wanting in defenses or evidence to sustain them.

It is therefore, the duty, as we are persuaded it will be the pleasure, of this court, to construe this contract most strictly against the defendant, that it can consistent with the plain import of its terms.

3. To relieve a common carrier from its common law lia-

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bilities, the exemption must be specific and distinct, and will not be implied from general expressions, which are susceptible of another construction. (*Wells et al. agt. The Steam Navigation Co.* 4 Seld. 375; *Alexander agt. Greene*, 7 Hill, 533.)

Wells agt. The Steam Navigation Co. was an action to recover damages for injury to the cargo of a canal boat which was sunk on the Hudson river while being towed by the defendant's steamer, under a contract, by which the boat was to be towed "at the risk of the master and owners thereof." The court, per MASON, J., says: "In this contract, nothing is said about negligence. The parties undoubtedly had reference to those perils of navigation which were not the result of the contractor's own negligence when they provided that the boat should be towed at the risk of the master and owners" (p. 379), and again (p. 380), "and is certainly much more reasonable to infer that when they declare that the boat should be towed at the risk of the owners, they intended such risks as were incident to the navigation when proper care and skill were exercised, rather than risks to which it might be exposed by the negligence of the persons in charge of the steamboat. * * * As there were risks of the navigation to which the special clause in the permit (the special contract) may naturally be applied, and more consistently with honesty and fair dealing than if extended to the negligence of the defendant, it is undoubtedly the duty of the court so to apply it. Such a construction is consonant with the probable intentions of the parties. I think the decision of the late court of errors, in *Alexander agt. Greene* (7 Hill 533), is conclusive upon this question."

While the court of appeals in *Wells agt. The N. Y. C. R. R. Co.* (24 N. Y. 181), have declared that the distinction theretofore made between different degrees of negligence no longer exists, it distinctly affirms the doctrine of *Wells agt. The Steam Navigation Co.* And consult, as to the same point (*Bissell agt. The New York C. R. R. Co.* 25 N. Y. 451).

Would it have enlarged or restricted, or at all affected the defendant's liability, in the case quoted from, had the term

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"all the risks" been used, instead of "at the risk of the master and owners thereof?" In either case the meaning is precisely the same; the boat was to be towed at the owner's risk. And this case settles the question that a boat towed, or a car load of horses conveyed, at the owner's risk, does not affect the carrier's liability occasioned by the negligence of his employees.

The exemption in that case was more extensive than in this. There the boat was to be taken from one end of the route to the other, "at the risk of the master or owner," while in this case the owner simply "undertakes all risk in * * * loading, unloading, conveyance or otherwise." This phrase "or otherwise," is meaningless (*See Wells agt. The N. Y. C. R.R. Co.* 24 N. Y. 184). Should the court hold that it in any manner enlarged or qualified the defendant's liabilities, its signification is nevertheless subordinate to and controlled by the term "risk."

4. This contract does not cover an injury which occurred after the horses were loaded, and while the car containing them was standing still on a "switch" of defendant's road, where it was placed, not as an ordinary or necessary incident to the performance of the contract, but, as the exceptions show, for the purpose of making an unjust and unfair discrimination in favor of dead freight, as against live stock. The conduct of the defendant as exhibited by the exceptions—and but a portion of the case appears in them—is of the most gross and flagrant character conceivable. And to shield the defendant from the consequences of this iniquitous misconduct, it will be necessary for the court to hold, that when the parties made this contract, they intended that the defendant might practice this disgraceful and outrageous cruelty on these horses, and not be responsible for it; for the contract is to be interpreted by the court as it was understood and intended by the parties. And, if the defendant coerced the plaintiff into a contract that by means of some latent trick, chicanery, "or otherwise" embraced within the ambiguous phrase, "or other contingencies," by means whereof an unconscionable advantage has been sought, the

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court should rebuke such unfair mode of procedure, and construe the contract in the most liberal manner in favor of the plaintiff.

5. This contract, neither by express terms nor fair implication, embraces exemption from liability occasioned by the misconduct of the defendant or its employees.

Amplification to any extent, cannot make this proposition stronger or more definite. It demands the exercise of but a modicum of common sense in construing this contract, to discover its force and truthfulness. It is quite unnecessary to appeal to adjudications after the explicit determination in the case of *Wells et al. agt. Steam Navigation Company*, that this contract furnishes no immunity from liability created by negligence, a much less grade of culpability than misconduct. If the rule of *stare decisis* is not obsolete, it must apply here.

Bissell agt. The New York C. R. R. Co. (24 N. Y. 442), *Wells agt. The Same* (24 N. Y. 181), and *Perkins agt. The Same* (24 N. Y. 196) are all cases to recover damages for injury to persons riding on free passes, or rather special contracts, whose language included an exemption from liability from whatever cause. The court held the contracts valid, and that the terms of the contracts relieved the company from liability resulting from the negligence of the company's servants. By reference to the contracts in those cases, it will be seen that they are very different from that under consideration.

So in *Lee agt. Marsh* (43 Barb. 102), the contract in terms relieved the defendant from all liability that was not created by willful negligence or fraud.

There is no reported case that holds that such a contract as this relieves the defendant from the consequences of the misconduct of itself or of its employees. The counsel for defendant, at the trial, relied much upon several Canadian and English authorities. A brief glance at them shows a very different state of things from what the counsel claimed.

The only question in *Bates agt. The Great Western Railway* (1 U. C. Law Journal, N. S. 319), and which was raised

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by demurrer, was whether the company had power to contract for a restriction of its common law liabilities. The court held it had.

In *Hamilton agt. The Grand Trunk Railway* (23 Q. B. U. C. 600), the court held that the defendant might, by special contract, relieve itself from the gross negligence of its servants.

Spetigue agt. Great Western Railway (15 U. C. Com. Pleas 315), is to the same point.

Sutherland agt. The Same (7 U. C. C. P. 409), relates to damages for injury to passengers, and has nothing to do with this case. Demurrer.

In *Woodruff agt. The Same* (17 Q. B.), the same question was involved as in *Sutherland's case*. A special contract was interposed as a defense, and was demurred to, and the validity of the contract sustained.

O'Rorke agt. The Same (23 Q. B. U. C.), really settles no question. The plaintiff in that case stipulated to relieve the defendant from liability, "whether arising from the negligence, default or misconduct, criminal or otherwise, on the part of the defendant or of their servants."

Van Toll agt. South Eastern Railway Co. (104 E. C. L. 186), decides that where a person deposited a bag in the defendant's cloak room, under a special contract, the defendant received it as ordinary bailee, and not as a common carrier.

Crouch agt. The London and Northwestern Railway (78 E. C. L. 254), has nothing whatever to do with this case.

In *White agt. The Great Western Railway* 89 E. C. L. 7), in the language of the court, "the question is one of mere special pleading."

Austin agt. The Manchester, Sheffield & Lincolnshire Railway (70 E. C. L. 453, S. C. 11 Eng. Law and Eq. 518), instead of being an authority for the defendant, it is an explicit and decisive authority in favor of our proposition. It was an action to recover for the killing of a horse while being conveyed under a special contract, as follows: "This ticket is issued subject to the owner's undertaking to bear

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all the risk of injury by conveyance and other contingencies ; and the owner is required to see to the efficiency of the carriage, before he allows his horses or live stock to be placed therein ; the charge being for the use of the railway, carriages and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the train leaves the station ; nor for any damage, however caused, to horses, cattle or live stock, of any description, traveling upon their railway, or in their vehicles."

The horse was killed by reason of the servants in charge of the train, neglecting to properly grease one of the axles, which took fire and the wheel broke. Plaintiff had a verdict, and on motion to arrest the judgment, the court, per CRESSWELL, J. said (p. 473) : " The question to be considered then is, what was the true nature of the contract entered into between the parties in this case ? The ticket, which contains the terms of the contract, was issued "subject to the owner's undertaking to bear all the risk of injury by conveyance or other contingencies." If this had been the only passage applicable to the risks to be borne by the owners, it might have been contended, on their behalf, that it did not extend beyond injuries sustained by reason of a journey by railway simply, or by means of some accident ; and that it would not protect the carriers from the consequences of negligence on the part of themselves or their servants. But the ticket further states that " the company will not be responsible for any damages however caused, to horses, &c.," and the court held that the accident by means of which the horse was killed, was covered by the express terms of the contract ; and arrested the judgment.

After conceding the power in the defendant to limit its liability by contract, it is impossible to see why the contract did not relieve the defendant in that case. But just compare that contract with the one under consideration in this case.

The first clause in that contract is substantially the same as the clause in question ; and the court very pointedly

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determined that it applied merely to the ordinary incidents of railway conveyance.

The court, however, went further and said, "but there is nothing in this declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods." * * * The question, therefore, still turns upon the contract, which in express terms exempts the company from responsibility for damages, however caused, to horses, &c. In the largest sense, these words might exonerate the company from responsibility, even for damage done willfully, a sense in which it was not contended that they were used in this contract."

The court plainly intimates that the contract would not have exempted the defendant from misfeasance, had that issue been made by the pleadings. That issue is joined in this action.

And this is the leading case, settling the law of Canada, as was claimed by the defendant's witnesses and counsel on the trial.

But it is unnecessary to pursue the argument further. While common carriers may relieve themselves from the consequences of the negligence or misconduct of their servants, the defendant has utterly failed to secure such exemption by this contract.

II. A railroad corporation cannot, by contract, exempt itself from liability for damage resulting from its own misconduct or recklessness, which is equivalent thereto. (*Perkins* agt. *The N. Y. C. R. R. Co.* 24 N. Y. 196; *Bissell* agt. *The N. Y. C. R. R. Co.* 25 N. Y. 446.)

In these cases it is recognized as the law that a railroad company may relieve itself from liability occasioned by the misconduct or negligence of its subordinate servants or agents, the question being yet unsettled what servants or agents, if any, are to be regarded as so directly representing the company, that such a contract may not be made.

This case is relieved from any embarrassment in that respect. The contract under which the defendant claims

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exemption from its common law liabilities was made on behalf of the defendant by a "station agent."

After the horses had arrived at Brantford, all the employees of defendant who had charge of the train in which these horses were conveyed departed, leaving the defendant's station agent and yard master, at Brantford, the only persons in charge of the defendant's property at that station.

To these parties plaintiff applied to have his horses unloaded, or for permission to unload them himself, in order that they might be fed and cared for, as they could not be fed while in the car, but both station agent and yard master refused to unload them, or to permit them to be unloaded. The injury complained of was the result of this refusal.

If a "station agent" so nearly represented the company as to bind it by his contracts, as it is conceded he could and did do in this case, why did not the "station agent" at Brantford have equal power to bind the defendant by his refusal to permit these horses to be fed and nourished?

The common law, independent of any statute, imposes upon the defendant the duty to keep some competent person in charge of all property intrusted to its care for transportation; and in the absence of the parties immediately in charge of the train, the "station agent being the principal employee of defendant present, had charge of all the company's property at that station.

The same power that made the contract was evoked to save these horses from injury. If the defendant's counsel desires to take the position that the acts of a station agent do not bind the company, we will agree with him and pronounce the contract void, and ask the defendant to respond on its common law liabilities. And if he takes the ground that the station agent has the power to bind the company, we will agree with him again, and ask the defendant to pay the damages occasioned by the misconduct of the station agent. Which horn of the dilemma will the counsel take?

III. The laws of the state of New York control the construction, interpretation and validity of this contract. It was in this state where the contract was to be performed

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(*Jewell agt. Wright*, 27 *How. Pr. R.* 481, and cases cited in brief of appellant's counsel).

The law on this point, is no longer open for discussion in this state.

The conveyance of the horses over the defendants road was a mere incident to the performance of the contract which consisted in the delivery of the horses in Buffalo to the plaintiff.

But we have shown that the plaintiff is entitled to recover under the laws of England, of Canada, as well as under the laws of this state. There is no real difference in the principles enunciated by the authorities in the different countries, the sworn opinions of several of our professional Canadian brethren to the contrary notwithstanding.

IV. The nonsuit should be set aside and a new trial ordered, costs to abide event.

SPRAGUE and FILLMORE, *for defendant*.

I. By the law of England, Canada, and of the state of New York, a railroad corporation may, by special contract (unless prohibited by statute), exempt itself from responsibility for injuries to property transported by it, occasioned by the gross and culpable negligence and misconduct of its employees, including that willful misconduct which consists in the intentional neglect of a known duty, and which is known in the law as willful negligence. (*Wells agt. Steam Navigation Company*, 2 *Comst.* 204; *Dorr agt. N. J. Steam Navigation Company*, 1 *Kern.* 485; *Opinion of GARDNER, J. in Wells agt. Steam Navigation Company*, 4 *Seld.* 375; cited and approved in *Wells agt. N. Y. C. R. R. Co.* 24 *N. Y.* 196; *Smith agt. Same, Id.* 222; *Bissell agt. Same.* 25 *N. Y.* 442; *Stinson agt. Same*, 32 *N. Y.* 337.)

As to the English and Canadian authorities, see as examples the cases cited hereafter under other points, in which the same doctrine is either stated or assumed to be the law.

II. By the contract in question (being clause No. 1 of the written instruments under which the property was trans-

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ported), the plaintiff assumed all risk of injuries resulting from the neglect, both ordinary and gross, of the servants of the defendant, and from that misconduct of its servants for which, in the absence of a special contract, it would have been responsible ; that is misconduct not amounting to a willful trespass.

First. The clause in question is the plaintiff's contract, and is therefore to be construed favorably to the defendant ; it is also to be construed so as to make all its words, as far as possible, effectual, and with the aids afforded by surrounding circumstances, and by our knowledge of the objects of the parties.

Second. As to the circumstances of the parties and the object of the contract.

(a) It was understood between the parties at the time the contract was made, that the defendant was not responsible for the acts or neglects of the plaintiff or his agents, nor for inevitable accidents. The only things therefore against which it was necessary for the defendant to guard itself by special contract, were accidents resulting from the acts of third persons, the acts of its employees occurring without fault, and the neglect and misconduct of its employees. It is submitted that railroad accidents resulting from the acts of third persons, or without fault on the part of the employees, to property in the course of transportation are so rare, that it would be unreasonable to suppose, that the chief object of this contract was to guard against them. Its intent then was, among other things, to protect the company against the consequences of the neglect and misconduct of its servants. This was substantially all that it was important for the company to protect itself against by a special agreement.

(b) By the clause in question, the owner, among other things, takes "the risk of loss and other contingencies in conveyance." It was well understood that one of those risks was delay and consequent lack by the animals of food and drink, and neglect and misconduct by the defendant's employees in those respects. There is therefore no more reason for excluding these risks from the operation of the

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contract than any other risks. The parties make no such exception, and the law will not alter their contract.

(c) The question between the parties was in general who should take the risks of the journey. In consideration of the freight charged, the plaintiff assumed the risks. There is nothing to show that the minds of either of the contracting parties were drawn to the consideration of the difference between different kinds of risk. Possibly, had his attention been called to it, the plaintiff would not have made a contract by which he took the risks of the misconduct of the defendant's employees; but there is nothing to show that the parties did in fact contemplate any exception whatever to the risk assumed by the plaintiff.

(d) If the injury had been the result of some slight neglect or misconduct of one of the employees of the defendant, it is believed, that the position of the defendant would not be seriously controverted. The objection consists in the gross character of the neglect and misconduct complained of. But if by the contract the defendant is relieved from one degree of misconduct he is from another. No distinction is made by its terms; and the law recognizes no distinction under which we can say that a contract covering negligence and misconduct at all, does not include their grossest as well as their slightest degrees. (*See Perkins agt. N. Y. C. R. R. Co.* 24 N. Y. R. 206; also *Smith agt. Same, Id.* p. 242.)

(e) Suppose that the defendant by its charter was only responsible for such liabilities as it should assume by special contract, and that it had entered into this contract assuming the risk in question, would there be any doubt that one object was to protect the plaintiff against the gross misconduct of the defendant's employees? But in the case at law the plaintiff assumes the same liabilities.

(f) In substantially the language of SMITH, J. in *Perkins agt. N. Y. C. R. R.* (24 N. Y. 203), it was known to the parties that the business of the company was to be performed by agents, some of whom would be negligent, and some of whom might misbehave, in despite of the utmost care in their employment. Parties are assumed to know this.

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Knowing this, the plaintiff assumed the risks of the trip; unless there was an exception to the contrary, this would naturally include all degrees of negligence of the defendant's agents.

(g) In the language substantially of ALLEN, SELDEN and GOULD, Justices, in *Smith agt. N. Y. C. R. R.* (24 N. Y. R. p. 239), there is no public policy which requires a railroad company always to be responsible for the gross misconduct of its employees. A party may if he please become his own insurer; and if the terms of the contract on a reasonable construction make him so, there is no reason why we should not suppose that such was his intention.

(h) In the language of Chief Justice BRONSON, quoted in *Alexander agt. Green* (7 Hill, 533), "whatever pains the defendant might take, losses might happen through the neglect or misconduct of the captain or hands" (the defendant's servants). These, as well as other risks, were to be borne by some one, and it was competent for the parties to agree who should bear the hazard. Here the parties settled the matter. They agreed that the vessel should be towed at the risk of the owner. It is impossible to say that the contract points to one kind of risk more than another, and if it does not cover all the perils of the voyage it means nothing." Although the chief justice was overruled in the particular case in which this opinion was delivered, yet his reasoning bears upon the question of the intention of the parties, and shows that there is nothing unreasonable in supposing that the parties intended to relieve the defendant from responsibility for injury to the property, although caused by the culpable negligence and misconduct of its employees.

Third. There being then nothing unreasonable or unnatural in a contract by which a party shipping property assumes the risk of the misconduct of the employees of a railroad corporation, it is submitted that such is the reasonable interpretation of the clause in question.

(a) Had the assumption of risk been expressed in the most general terms, to wit, that the property was shipped "at the risk of the owner," that risk as between the shipper

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and a railroad corporation would exempt the latter from liability for the negligence of its employees. The term "risk" in its popular sense, includes every hazard, however caused. So in the law of insurance, it covers losses by the gross and culpable misconduct and negligence of the agents of the insured (*Phillips on Insurance*, vol. 1, §§ 1049, 1096, and cases cited). The cases of *Schiffelin* agt. *Harvey* (6 J. R. 180), *Alexander* agt. *Greene* (7 Hill, 533), were decided before the distinction between the liability of a party for his own neglect and that of his agents, and especially the agents of a corporation, who cannot be under the personal inspection of its directors, had been discussed or established; and in the light of that discussion, and as applied to corporations, the arguments of Chief Justice BRONSON, and of HILL, *arguendi*, seem unanswerable. Neither those cases nor the case of *Wells* agt. *Steam Navigation Co.* (4 Seld. 375,) are in point in an action against a corporation. See also the criticism of the case of the *New Jersey Steam Navigation Co.* agt. *Merchants' Bank* (6 How. U. S. C. R. 344); in *Smith* agt. *N. Y. C. R. R.* (24 N. Y. R. 250). *Wells* agt. *Steam Navigation Company*, was put by Justice MASON upon the ground that it would be highly improbable that a party would seek by agreement to be relieved from his own gross neglect; a ground which has no application to a corporation and the neglect of its agents. It is impossible to say upon what ground *Alexander* agt. *Greene* was decided (See Justice BRONSON's criticisms of this case in *Wells* agt. *Steam Navigation Company*, as decided in 2 Comst. p. 208).

In England it is held that this general clause includes the gross negligence of the employees of the carrier. *Leeson* agt. *Holt* (1 Stark. R. 186), approved by SELDEN, J. (24 N. Y. R. 215); and it has been lately so decided in Canada in an action against a railroad corporation. (*Sutherland* agt. *G. W. R. R. Co.* 7 U. C. P. R. 415; see also *Stinson* agt. *N. Y. C. R. R. Co.* 32 N. Y. R. 333, which sustains the same doctrine.)

(b) But the cases cited of contracts where property was shipped "at the risk of the owners," were decided upon

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the peculiar and very general terms of the contract, and throw very little light upon the construction of the contract in question. (See opinion of GARDINER, J. in *Wells* agt. *Steam Navigation Co.* 4 Seld. 375; also opinion of ALLEN, J., concurred in by SELDEN and GOULD, Justices, in *Smith* agt. *N. Y. C. R. R.* 24 N. Y. R. 251.)

(c) In construing this clause and distinguishing it from the words "property at the owner's risk," effect should be given in the first place to the word "all." See Senator PORTER's opinion in *Alexander* agt. *Greene* (7 Hill, 559), where weight is given to the distinction between "the risk" and "all risk;" also Justice WRIGHT's opinion in *Smith* agt. *N. Y. C. R. R. Co.* (24 N. Y. R. 227). Taking "all risk" of loss is equivalent to taking the risk of "all losses," however caused. So the terms "loss, injury and damage," include all kinds of loss, &c., without restriction as to cause. So effect should be given to the word "contingencies." This does not mean damage to the property. That is already provided for. If the word "accident" were employed in its stead, it would clearly refer to the cause of the injury. But the word contingency is broader than accident. It includes everything that may or may not happen, through the result of gross and deliberate misconduct. This is its legal as well as popular signification (See *Bouvier's Law Dic.* "Contingent").

So the term "conveyance" signifies "while being conveyed," and the clause was intended to cover all losses occurring during the conveyance of the property, without restriction as to its cause. The word "otherwise" is at least equivalent to the words "in any other manner," which would include losses by neglect. If it does not, it means nothing, and might as well be stricken from the contract. Taken in connection with the rest of the clause, the meaning is that the plaintiff takes the risk of loss, "however caused," and that the defendant would not be responsible under such a clause, is settled by authorities which will be cited hereafter. Again, if the clause stopped at the word "contingencies," the construction might be doubtful; but upon the

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plaintiff's construction the rest of the clause is meaningless and inoperative. Finally, it is submitted that it is apparent from the whole clause that the plaintiff intended to assume the risks incident to the trip; and it is not the province of the court to interpolate an exception, even if they believe that they would not have made such a contract had they been in the plaintiff's place.

Fourth. It is perfectly well settled by the English, Canadian and New York authorities, that where property is transported under a contract by which the shipper takes the risk of injury, however caused, this clause exonerates the carrier from responsibility for the gross and willful neglect and the misconduct of its employees; at least if the carrier is a corporation; and it is submitted with the utmost confidence, that such in substance is the legal effect of the contract in question. It will be noticed that in all the cases no distinction is made between contracts where the shipper takes the risk of injuries however caused, and cases where the carrier stipulates that he shall not be responsible for them.

(a) The Canadian authorities are *Sutherland* agt. *The G. W. R. Co.* (7 U. C. Com. Pl. R. 315); *Hamilton* agt. *Grand Trunk Railway Co.* (23 Q. B. R. of Up. Can. 600, 607, 609); *Bates* agt. *G. W. R. Co.* (1 Law J. Up. Can. 319); *O'Rourke* agt. *G. W. R. Co.* (23 Q. B. Can. 427); *Spetigue* agt. *G. W. R. Co.* 15 U. C. Com. Pl. R. 315), of which see particularly *Sutherland's case* and *Hamilton's case*.

(b) Among the English authorities, see *Leeson* agt. *Holt* (Stark. R. 185); *Austin* agt. *Manchester, &c. R.* (70 E. C. L. R. 454); *Vantole* agt. *Southeastern Railway* (104 E. C. L. R. 75); *Peck* agt. *Northeastern R. Co.* (96 E. C. L. R. 957, in *Exchequer Chamber on appeal from the Queens Bench*); *White* agt. *G. W. R. Co.* (89 Id. 7); *Hughes* agt. *G. W. R. Co.* (78 Id. 637); *Chippendale* agt. *The Lancashire, &c. R.* (7 Law and Eq. R. 395); *Carr* agt. *Same* (14 Id. 340,) PARKE, B. saying, "we ought not to fritter away the meaning of contracts merely for the purpose of making men careful (*York, &c. Co.* agt. *Crisp*. 14 C. B. R. 527).

(c) As to the authorities in the state of New York, in

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Stinson agt. *N. Y. C. R. R.* (32 *N. Y. R.* 333), the agreement was that the owner should load, unload and *tranship* (see p. 337, not *transport* as the statement of the case reads) at his own risk.

The court assume that this would include every risk, incident to loading, unloading and transhipment. Had the clause read that the stock was to be loaded, &c., by the company at the risk of the plaintiff, the conclusion must have been the same. (*Bissell* agt. *N. Y. C. R. R. Co.* 25 *N. Y. R.* 442; see opinions of GOULD and SELDEN, Justices; *Perkins* agt. *N. Y. C. R. R.* 24 *N. Y. R.* 196; see opinion of SMITH, Justice.)

See opinion of SELDEN, J. in another case, title not given (24 *N. Y. R.* 207), based upon the supposition that the contract was simply that the plaintiff takes "the risk of injury however caused;" and in the course of which he says, "our language affords no words more comprehensive than these. The agreement should be construed to exempt from every species of liability which the law will permit to be contracted against."

Smith agt. *N. Y. C. R. R. Co.* (24 *N. Y. R.* 222), on a careful examination will be found to have been decided upon the ground that the contract was not made with the plaintiff's intestate, that it was not valid as to a passenger for hire, and that, according to one of the judges, the furnishing of an improper car was an act of the corporation itself. The judges assume that the position taken by the defendant in this case is correct; see particularly the opinions of ALLEN, SELDEN and GOULD (p. 239), in which they say that the contract "the person riding with the stock takes the risk of injury from whatever cause," was comprehensive and worded in the very terms of *Austin* agt. *The Manchester Railway*, and the *York, &c. Co.* agt. *Crisp*, cited above.

Fifth. A railroad company is not responsible as a common carrier for the transportation of live stock, but only for actual negligence. To say therefore that the contract does not cover negligence, is to destroy its entire operation (See note 1, *Am. Railway Cases*, p. 181).

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Sixth. The property being transported under a special agreement, that only furnishes the rules by which the duties and liabilities of the parties are to be ascertained. The defendant is not responsible as a common carrier, but only by virtue of his contract; and the contract, it is submitted, does not make it responsible for the damages sustained by the plaintiff in this cause (*See note 1, Am. R. Cases, 181*).

Seventh. If a new trial is granted, the court is respectfully requested to intimate whether in its opinion the effect of the contract is to be determined by the laws of Canada or the laws of New York, as that question will probably arise upon such trial.

The contract in question was made in Canada, by a Canada corporation, for transportation, to be substantially performed in Canada. The delivery in Buffalo was a mere incident to the contract. The injuries complained of occurred while the property was being transported in Canada. Under these circumstances it is submitted that the question whether or not the defendant is responsible for those injuries is to be determined by the law of Canada.

For a citation of all the authorities as to the place of performance affecting the *legem loci*, see *Jewell agt. Wright* (30 N. Y. R. 259).

By the court, MASTEN, J. I understand it to be settled law in this state, at the present day, that railroad corporations engaged in the transportation of property are subject to the absolute responsibility which, by the common law, rests upon common carriers; they are, except as against loss or injury occasioned by the act of God or of a public enemy, insurers of the safe transportation and delivery of the property entrusted to them for carriage.

In the carriage of living animals, except as to those injuries which result from the vitality of the freight, and could not by care and diligence be prevented, they are bound to the same responsibility as in the carriage of inanimate property.

Common carriers cannot, by contract, shield themselves

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from liability for their own fraud, or their own willful act or negligence, but they may contract against liability for that low degree of negligence or want of care on their part, which is not equivalent to willful or wanton neglect of duty or recklessness.

They may also, by special contract, relieve themselves from all responsibility for injury to or loss of the property entrusted to them occasioned by the negligence, misconduct, fraud or felony of their employees or servants.

When the carrier is a corporation, whose affairs are entrusted to the management of a board of directors, it cannot exempt itself from liability for the willful negligence, misconduct or recklessness of its board of directors. This rule does not extend to its subordinate agents or servants, and the weight of opinion seems to be that it does not extend to any officer or agent of the corporation other than the directors. (*Dorr agt. The New Jersey Steam Navigation Co.* 1 Kern. 485; *Clarke agt. Rochester and Syracuse Railroad Company*, 14 N. Y. 570; *Wells agt. The N. Y. C. R. R. Co.* 24 N. Y. 180; *Perkins agt. The N. Y. C. R. R. Co.* 24 N. Y. 196, 214; *Bissell agt. Same*, 26 N. Y. 442.)

The right of common carriers to restrict their liability to the extent above stated was, after some controversy, finally established in England, and it was the abuse of that right by carriers which led to the passage, in 1854, of "the railway and canal traffic act," by which this right was limited. (*Peck agt. N. S. Railway Co.* 16 Eng. Com. Law R. 1005; *Id.* 96 Eng. Com. Law R. 958, 986.]

As early as Lord COKE's time, it would seem that a common carrier could, by contract, restrict to a certain extent his common law liability (*Note, Southcoate's Case, Coke's R. par. 4, p. 88*).

But until within the last quarter of a century, the weight of authority in England and in this country, was that "the salutary policy of the common law" did not allow a common carrier, even by special contract, to shield himself from responsibility for the fraud, misconduct or gross negligence of his servants. And the law is so laid down by

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Chancellor KENT and Judge STORY in their commentaries. [2 *Kent's Com.* 608 ; *Story on Bailments*, § 549.]

But, as I have already said, it was finally established by the decisions of the courts in England and in this state, that the policy of the common law did not prevent the carrier from exonerating himself by agreement from liability for the negligence of his servants.

In view of the great extent to which the carrying business is monopolized in this country by corporations and combinations, and the power that they possess to dictate terms, it is quite probable that legislative interference will be successfully demanded, as has been done in England.

Indeed I see in the Civil Code, which has been reported by the commissioners, a provision that "a common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants."

The commissioners have, I think, divided negligence into degrees too refined for practical purposes.

The injury to the plaintiff's property, for which this action is brought, was occasioned by the willful misconduct of the defendant's servants and against responsibilities for which it was lawful for the defendant to contract.

This brings us to the construction of the special contract of carriage between the parties.

The law being settled, the contract is to be construed according to the intent of the parties to be gathered from the language used, giving, if possible, some force and effect to every word made use of as evidence to some extent of their intent.

The contract is, "the owner of the within mentioned animals undertakes *all risk* of loss, injury, damage and other *contingencies* in loading, unloading, conveyance and *otherwise*."

These words are very general and comprehensive. I do not see how we can say that they do not embrace all (every) risk (hazard, danger, peril, chance) of loss, injury, damage and other contingencies (casualties, accidents, occurrences),

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in loading, unloading, conveyance and otherwise (other manner or way), which the plaintiff might lawfully take upon himself and the defendant lawfully throw off of itself. If we undertake to limit these general and comprehensive terms, I do not see where we are to draw the line. What have we to draw it by? If I knew of any way upon the principles by which courts must be governed to secure certainty or safety to suitors, to draw the line where the plaintiff contends it should be, I would be pleased to do so.

If we go outside of the writing to ascertain the intent of the parties as an independent fact, I think we would find that the defendant intended to get rid of all responsibility it lawfully could; that to avoid responsibility for the carelessness, negligence and misconduct of its servants was prominently in view, and that the plaintiff was compelled to accept the terms dictated.

Judgment ordered for defendant upon the exceptions.

CLINTON, J., concurred. VERPLANCK, P. J., dissented.

SUPREME COURT.

JAMES MEYER, JR., respondent agt. JACOB GOEDEL, appellant.

Where a cause, in which there are different *counts* or *causes of action*, is brought to trial, and evidence is given by the plaintiff affecting all the causes of action, at the close of which, the defendant moves for a *non-suit* as to one of the separate causes of action, the granting such non-suit and continuing the action as to the other causes, is of *doubtful propriety*.

It leaves all the evidence relating to that branch of the case before the jury; while the defendant, by the non-suit, may suppose the testimony on that subject immaterial and omitted to contradict or explain it. He however, has a remedy, by moving the court to strike out the testimony relating to that branch of the case.

If the defendant does not take this course, he cannot take a valid *exception* to the permission of the opposite counsel being allowed to comment on such testimony to the jury; as the evidence was properly taken in the case and had not been stricken out, the fact of the declaration of the judge that he did not consider this cause of action sustained, did not have the effect to remove the evidence from the case.

The refusal of the judge to open the case and admit evidence, after the summing up to the jury was through, is no proper ground of *exception*. Neither would

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the admission of evidence, under such circumstances be considered a good ground of exception. In both respects it is a matter of discretion with the judge.

An *exception* will not lie to the declaration of the judge to the defendant's counsel, that in his opinion it is unnecessary to examine witnesses for the defense, and the jury find for the plaintiff.

An *exception* will not lie to the refusal of the judge to recall and re-examine a witness as to certain facts which counsel alleges the judge has incorrectly stated in his recapitulation to the jury.

An *exception* will not lie to a permission or refusal of the judge to recall a witness for re-examination, after his examination has been finished.

An *exception* will not lie to the refusal of the judge to receive new evidence offered by counsel after he has rested. All these cases are within the discretion of the judge, and are not reviewable.

It is a well settled principle of law, that in an action for *fraudulent representations*, other contemporaneous acts of fraud of a *similar character*, may be given in evidence for such a cause. And where such evidence is before the jury, although the particular cause of action in which it was given has been *dismissed*, it is not error in the judge, in charging the jury, to say that they may take such evidence into consideration.

New York General Term November, 1865.

Before INGRAHAM, P. J., LEONARD and BARNARD, *Justices.*

THE plaintiff sued the defendant to recover from him damages for fraud alleged to have been committed in the sale of certain stocks by the defendant to the plaintiff. There were two sales, one of stock in the New York and Richmond Coal Company, and the other of an interest in the Cumberland Saltpetre Company. Two causes of action were stated in the complaint, one in regard to the sale of the coal stock, and one in regard to the interest in the saltpetre company. Upon the trial, evidence was offered by the plaintiff as to each transaction and received by the court without objection.

When the plaintiff rested, the defendant moved for a dismissal of the complaint as to the second cause of action, relating to the interest in the saltpetre company, on the ground that there was no proof to support that cause of action. The court said it did not think there was any evidence to support this count, and granted the motion.

A motion was then made to dismiss the complaint as to the first count, which was denied.

The plaintiff's counsel, on the summing up, referred to the evidence which had been given in regard to the interest in the saltpetre company, and claimed that the jury had a right

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to consider the same as acts of a similar character, with a view of proving the criminal intent of the party charged. This was objected to by the defendant's counsel and overruled, and the defendant excepted. The defendant's counsel then offered to prove that in the matter relating to the saltpetre company the defendant committed no fraud. This offer was refused, and defendant excepted.

The court charged the jury, that in actions of this character, acts of a similar character, if done at or about the same time, may be given in evidence, with a view of proving the criminal intent of the party charged, and that the jury had a right to consider the representation in regard to the saltpetre company, in connection with the others. To this charge the defendant excepted.

WM. WARE PECK, *attorney, and*
JOHN VAN BUREN, *counsel for defendant, appellant.*
BOWDOIN, LAROCQUE & BARLOW, *attorneys, and*
JEREMIAH LAROCQUE, *counsel for plaintiff, respondent.*

First. The defendant's counsel having very properly given up the struggle on the facts as hopeless, by omitting to move for a new trial at the special term, nothing remains open on this appeal, except to consider the exceptions taken to the rulings of the learned judge on the trial.

Secnd. The defendant's motion for a dismissal of the first cause of action was properly denied. No cause was assigned for it beyond that urged as a ground for the dismissal of the second, which clearly was not applicable to the first, even if it was properly granted as to the other, which it is respectfully submitted that it was not. (*Exceptions, fol. 275; see Conkey agt. Bond, 34 Barb. 276, in which Mr. Justice ALLEN, who tried this cause, dissented, and cases cited; Maurice agt. Gould, MS. Superior Court, per ROBERTSON, Ch J.*)

Third. The several exceptions taken on the part of the defendant to the overruling of questions calling for the judgment and opinions of witnesses are untenable.

Fourth. The exception of the defendant's counsel, "to so

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much of the charge as holds, in compliance with the request of the plaintiff, that the evidence in regard to the Cumberland Saltpetre Company may be taken into consideration on the question of intent as to the transfer set up in the first count " was not well taken.

1. That request was in these words: "That upon the question of intent with which the representations as to the Richmond Coal Company stock were made, the jury have a right to take into account the evidence as to the representations made as to the Cumberland Saltpetre Company interest, which the defendant proposed to sell to the plaintiff at about the same time, and the evidence as to their truth or falsity."

2. This request was replied to by the learned judge in his charge to the jury, as follows: "The rule of law and the decisions, I think, are not different from that here laid down by Mr. Larocque, in actions of fraud. In an action of this character, where the intent of the party charged is in issue, acts of a similar character, if done at or about the same time, may be given in evidence, with a view of proving the criminal intent of the party charged. In regard to this saltpetre company, however, it is fair to remark, that the evidence was not given or received with that view, and not expressed as so given, until the summing up, though not by any unfairness on the part of any one; but if there were any misrepresentations proved, although I thought there were none, and nonsuited for that reason, still that question, so far as it bears upon this, is before you; but it is due to the defendant to say, that possibly had the evidence been offered and given, or received with a view to affect and operate upon the Richmond coal stock transactions, other evidence would have been given in contradiction. It is for you to say what effect the evidence would have upon the transaction."

3. That this, under the decisions, was correct in point of law, is almost too clear for discussion. The present is, in fact, the strongest case ever presented for the application of the rule, the representations being absolutely cotemporaneous, and made to the same person, and if also false, remov-

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ing all reasonable doubt that they were made with the design to deceive and defraud, and not the result of mistake or accident. (*Hall* agt. *Naylor*, 18 *N. Y. R.* 588, *in court of appeals*; *Allison* agt. *Matthews*, 3 *Johns.* 235; *Benham* agt. *Cary*, 11 *Wend.* 83; *Jackson* agt. *Timmerman*, 12 *Wend.* 299; *Cary* agt. *Hotailing*, 1 *Hill*, 311; *French* agt. *White*, 5 *Duer*, 254; *Van Kirk* agt. *Wilds*, 11 *Barb.* 520; *Fuller* agt. *Acker*, 1 *Hill*, 473; *Simmons* agt. *Fay*, 1 *E. D. Smith*, 107).

4. They were most tenderly and guardedly submitted to the jury, so as to prevent absolutely all prejudice to him, and to deaden their effect more than any further evidence that he could have given would have done.

5. That this was so, a very slight examination of the concurring testimony of two witnesses, whom the jury, through their verdict, declared that they did believe, at the same time that upon the square issue presented to them by the judge's charge they avowed their disbelief of the defendant, will satisfy the court. It is only necessary to compare Meyer and Schwarz with the defendant's sworn answer, where he denies making these representations, and avers that he was himself the owner and seller of the interest purchased by Mr. Meyer, in contradiction of the state of facts represented.

The judge states, in his charge, that the verified complaint and answer had been read in the hearing of the jury, and calls their attention to them, so that the defendant had the full benefit of his denial, without a cross-examination.

6. If, with a charge thus deliberately made and substantiated by evidence, the defendant preferred to seek its dismissal on technical grounds, rather than meet the issue on the trial, the inference is patent and irresistible, that he shrank from the ordeal of a cross-examination on this subject. His counsel will hardly wish or be permitted to claim that he did not know the law, and what effect it gave to this testimony in its bearing on the other charge. If he did not, his own client, and not the plaintiff, must bear the consequences.

Fifth. The highly dramatic scene which was performed in

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the progress of the summing up on the part of the plaintiff, by defendant's counsel then rising, objecting to the comments made on the Cumberland saltpetre case, and for the first time tendering further evidence to rebut the testimony on the part of the plaintiff on that subject, undoubtedly had its effect, as intended, upon the jury, but furnished no basis to support the exception which was taken to the judges's refusal to reopen the cause.

It is strictly a matter of discretion on the part of a judge presiding at the trial, whether he will permit further evidence to be given under such circumstances, and no exception lies to his refusal. (*Alexander* agt. *Byron*, 2 *Johns. Cas.* 318; *Jackson* agt. *Talmadge*, 4 *Cow.* 450; *Stacy* agt. *Graham*, 3 *Duer*, 444; affirmed, *Court of Appeals*, 2 *Kern.* 492; *Matthews* agt. *Whitney*, 12 *Wend.* 396; *People* agt. *Rector*, 19 *Wend.* 569; *Kellogg* agt. *Kellogg*, 6 *Barb.* 116; *Burger* agt. *White*, 2 *Bosw.* 92.)

By the court, INGRAHAM, P. J. It is proper to remark that in this case no motion was made for a new trial upon the facts, or for any cause whatever arising upon the evidence, and we are here confined entirely to the exceptions taken upon the trial. First, to the refusal of the court to open the case after it had been summed up to the jury, for the purpose of admitting testimony to disprove any supposed fraud in the sale of the interest in the saltpetre company; and secondly, to the charge of the judge, that the jury might take the evidence in the case on that subject into consideration on the question of intent.

The propriety of the course adopted on the trial of non-suiting, as to one count or cause of action in a complaint, and continuing the action as to the other, is at least of doubtful propriety. The result in this case shows its impropriety, and may work injustice to the party. In this case the granting such a motion left all the evidence in the cause relating to this branch of the case before the jury, while the defendant, by the dismissal, may have supposed the testimony on that subject immaterial and omitted to contradict

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or explain it. He had, however, a perfect remedy if he had seen fit to apply it, viz: to move the court to strike out the testimony relating to that branch of the case. Such a motion would have disclosed at once whether the plaintiff intended to use that evidence as he afterwards claimed to do, and he would have had an opportunity to offer any rebutting testimony. This he omitted to do.

So also he might, after the trial, have moved the court for a new trial, on the ground of surprise, and might have obtained relief in that form.

The first exception to the counsel being allowed to comment on this evidence to the jury, is not well taken. The evidence was taken in the case and had not been stricken out. It was offered generally in the cause, and so received, although applicable more especially to the second cause of action. There was no error in allowing the counsel to use such evidence for the purpose stated, viz: to show the criminal intent of the defendant.

The principle is too well settled to require the citation of authorities to show that in an action for fraudulent misrepresentations, other contemporaneous acts of fraud of a similar character may be given in evidence for such a cause. The court could not properly prohibit the counsel from calling the attention of the jury to any evidence before them, or from using such evidence for this purpose.

The fact of the declaration of the judge, that he did not consider this cause of action sustained, did not have the effect to remove the evidence from the case, and I think he committed no error in this ruling.

Nor did the judge err in refusing to open the case and admit evidence after the summing up to the jury was through. As before suggested, he might for that reason, if a proper case of surprise had been shown, have granted a new trial on terms, but that was in both respects a matter of discretion with the judge, to which no exception can be taken.

His refusal to admit further evidence, has never so far, as I recollect, been considered a good ground for excepting, nor has the admission of evidence under such circumstances.

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There are various cases to show that such is matter of discretion. Thus, where the court intimates to the defendant's counsel, that in his opinion it is unnecessary to examine witnesses for defense, and the jury found for plaintiff, a new trial was refused (*Beekman* agt. *Bemas* 7 *Cow.* 30); so, where the judge in recapitulating testimony was, as alleged by defendant's counsel, in error as to facts, his refusal to recall and examine the witness again, was held to be a matter of discretion, and not reviewable (*Shepard* agt. *Potter*, 4 *Hill*, 202). So a permission or refusal to recall a witness for re-examination, after his examination has been finished, is a matter of discretion not to be reviewed (*Meakim* agt. *Anderson*, 11 *Barb.* 215). So, where after the counsel had rested he discovered new evidence, and offered to produce it, which was refused by the judge, the court held it to be discretionary. (*Ford* agt. *Niles*, 1 *Hill*, 300; *Alexander* agt. *Byron*, 2 *Johns. Cas.* 318.)

In *Mercer* agt. *Sayer* (7 *Johns.* 308), the court held in such a case that it was a matter of discretion in the judge to admit or refuse the evidence, but as he refused it upon the ground that he had no power to do so, it was held erroneous. It is not intimated, however, that his discretion, if exercised, would have been reviewed.

From all these cases I conclude that the decision of the court in this case was within the discretion of the judge, and there is nothing that warrants the granting a new trial therefore.

The remaining question is as to the charge of the judge, that the jury might consider this evidence. I have already remarked that it was before the jury as all the other evidence in the cause, and nothing had been done by the defendant to exclude it from the consideration of the jury, that it was a species of evidence which might be used for the purpose suggested by the court, and that the omission of the defendant to contradict it on the trial was no reason for excluding it from the jury. The exception to the charge therefore, in this respect, was unavailing. That the defendant might

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have succeeded on a motion for a new trial is probable, but it does not come within the province of the appellate court on a bill of exceptions to grant it.

The judgment should be affirmed.

SUPREME COURT.

JACOB GRANTMAN, by his guardian, JOHN GRANTMAN agt.
GEORGE THRALL.

The Code (§ 316) makes the *guardian of an infant, plaintiff*, responsible for costs of the action, when they are adjudged against such infant, and provides that, "payment thereof *may* be enforced by *attachment*." This means a process in the nature of a *ca. sa.* And it is not strictly necessary for the defendant to first issue his *execution* against the infant, in order to fasten the liability upon the guardian and entitle the defendant to his attachment, though this is perhaps the better practice. Nor is there any necessity of an order of the court to first bring the guardian into *contempt*, before the attachment can issue.

The issuing of the attachment results simply from the adjudication against the infant plaintiff. The measure of liability and the means of enforcement are prescribed by law, and the court cannot refuse to a party on a proper application the process which the law in terms gives him.

The word "may" in statutes has always been held to be *imperative*, and equivalent to *must* or *shall*, whenever the public or third persons have a claim *de jure* that the power should be exercised.

It is clear that the *poverty* of the guardian is no defense to a motion for the attachment.

Seventh Judicial District General Term September, 1866.

Before WELLES, E. D. SMITH and JOHNSON, Justices.

THIS was an appeal by the defendant from an order at special term, denying motion for an attachment against the guardian, for costs of the action. The defendant had judgment for costs of the action, and issued his execution to collect the same, which was duly returned wholly unsatisfied. Thereupon he duly demanded payment of such costs from the guardian, who refused to make payment. Upon an affidavit of the facts and notice, the defendant moved, at special term, for an attachment against such guardian, in the nature of a *ca. sa.*, to enforce such payment. The guardian resisted the motion, upon an affidavit that he had a family dependent

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upon him for their support, and had no real estate whatever and no personal property liable to execution, and had no means by which he could pay.

The court denied the motion for an attachment, but granted the defendant a precept in the nature of a *fi. fa.*

MATHER & MACOMBER, *for defendant.*

J. C. COCHRANE, *for guardian.*

By the court, JOHNSON, J. This court decided this precise question at the last December general term, in the case of *Gardner, Guardian agt. Joel*. In that case the attachment was granted against the guardian in a case like this, the guardian showing by affidavit, as in this case, his entire want of property subject to execution, and his utter inability, pecuniarily, to pay the costs. That order was affirmed on appeal to the general term, the court holding, both at special and general term, that the facts set out in the affidavit of the guardian, of his want of property, was no answer to the application for the attachment. The Code (§ 316) makes the guardian of an infant, plaintiff, responsible for the costs of the action when they are adjudged against such infant, and provides that "payment thereof may be enforced by attachment." That this means a process in the nature of a *ca. sa.*, admits, I think, of no doubt. It is so understood in all the books of practice, and such is its plain meaning in legal parlance. This, I think, is plainly a remedy given to the defendant in the action to enforce payment of his costs when he becomes entitled to costs in such an action. It is a process given to the party to enforce a liability in his favor which the statute imposes, not conditionally, but absolutely and imperatively. I do not see that, strictly, it is necessary for the defendant in such a case to first issue his execution against the infant, in order to fasten the liability upon the guardian, and entitle the defendant to his attachment, though I should think that the more reasonable and better practice (2 *N. Y. Pr.* 418). Nor do I see that the question of contempt of court, arises in the case. It is simply a liability

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which the statute creates, and to enforce payment of which it gives this process. It does not depend upon any order of the court, but results simply from the adjudication against the infant plaintiff. Under the Revised Statutes the next friend of an infant plaintiff was made responsible for costs, but no process was given to the party to enforce payment as now (2 *R. S.* 446, § 2). The mode of enforcing payment was left to the practice of the courts. That mode, according to the course of the practice, was to first bring the party into contempt, and then apply for an attachment. But now both the measure of liability and means of enforcement are prescribed by law, and I do not see how the court can refuse to a party the process which the law in terms gives him. The word *may* in statutes has always been held to be imperative, and equivalent to must or shall, whenever the public or third persons have a claim *de jure*, that the power should be exercised. (*Smith's Com.* 727 ; *The Newburgh Turnpike Co. agt. Miller*, 5 *Johns. Ch. R.* 112.) Manifestly, this is a right given to the party, and not a mere discretionary power conferred upon the court. In this view the provision is in no respect in conflict with the provisions of the act of 1847 (*Sess. Laws of 1847, chap. 390, § 2*), which is, that "no person shall be imprisoned for contempt of court in not paying costs." But, if it is, the effect of this provision of the Code, enacted several years afterwards, would be to take the particular case out of the general provision. It is clear enough that the poverty of the guardian is no defense to the motion.

The Code does not make either his liability for costs, or the defendant's right to the attachment, depend upon any such conditions ; and I have no doubt that one object the legislature had in view in giving this remedy, was to protect persons from being vexed and harrassed by actions brought in the name of infants by irresponsible guardians. The granting of the process in the nature of a *fieri facias*, was a vain thing, as the guardian shows by his affidavit that he has not now, and had not when the action was commenced, any property to which it could possibly attach. I am of the

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opinion, therefore, that the application for the attachment in the nature of a *ca. sa.* was improperly denied, and that the order should be reversed, and the order for the attachment granted, with costs.

SUPREME COURT.

DWIGHT LOVELAND, appellant agt. ELISHA N. ATWOOD,
respondent.

A notice of appeal from a justice's judgment, under § 371 of the Code, which specified the following grounds, was held insufficient, to require an offer from the respondent, to wit: 1st. That the justice had not jurisdiction of the case, because the parties were tenants in common of the subject matter.

2d. The justice erred in allowing plaintiff for hay, as the defendant furnished all the hay necessary to winter out the stock.

3d. The damages were excessive.

4th. There was no evidence to warrant a judgment for the plaintiff above \$5.

5th. The justice erred in receiving in evidence the written contract.

6th. The defendant demands a new trial, because the claim of each party in his pleadings was above \$50, and the judgment is above \$50:

7th. That the case was without evidence to sustain a judgment for \$79.

A notice purporting to state the grounds of appeal without intimation of further claim, does not require an offer from the respondent at his peril, even though some one or more of the grounds of appeal might be construed into a sufficient demand for a modification, had that purpose been pointed out (POTTER, J. dissented.)

Fourth Judicial District General Term July, 1866.

Before BOCKES, JAMES, ROSEKRANS and POTTER, Justices.

APPEAL from an order of a county judge.

This cause arose in a justice's court, and on its trial there a verdict was rendered for the plaintiff for \$79. The defendant appealed, and on the trial in the county court the plaintiff had a verdict for but \$39. Each party presented a bill of costs for adjustment. The clerk allowed the plaintiff's bill and disallowed the defendant's. The defendant appealed to the county judge, and he reversed the decision of the clerk, and ordered that the defendant's costs be adjusted and inserted in the judgment, and that plaintiff's costs be

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disallowed. From this order of the county judge comes this appeal.

The notice of appeal from the justices' court to the county court, did not claim that the judgment appealed from should have been more favorable to the defendant. It assigned the following grounds of error:

1. That the justice had not jurisdiction of the case, because the parties were tenants in common of the subject matter.

2. The justice erred in allowing plaintiff for hay, as the defendant furnished all the hay necessary to winter out the stock.

3. The damages were excessive.

4. There was no evidence to warrant a judgment for the plaintiff above \$5.

5. The justice erred in receiving in evidence the written contract.

6. The defendant demands a new trial, because the claim of each party in his pleadings was above \$50, and the judgment is above \$50.

7. That the case was without evidence to sustain a judgment for \$79.

J. MAGONE, *for plaintiff.*

D. MAGONE, JR., *for defendant.*

By the court, JAMES, J. By section 371 of the Code, as amended in 1864, costs are allowed to the prevailing party in judgments rendered on appeal in county courts in all cases, except as therein specified. The plaintiff was the prevailing party, and was entitled to costs on the appeal in this case, unless it comes within some of the exceptions.

To secure an appellant the advantages given by section 371, in case he reduce the recovery below, his notice of appeal must state the particular, or particulars wherein he claims the judgment below should have been more favorable to him, in which case the respondent must, within fifteen days, serve an offer in writing to allow the judgment to be corrected in the manner mentioned in such notice, or the appellant will

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be entitled to costs, if the judgment of the appellate court is more favorable than the judgment below.

In this case no offer was made, the judgment on the appeal was more favorable to the appellant than the judgment below, and therefore the only question is, whether the notice was sufficient to require an offer from the respondent.

In *Wallace agt. Patterson* (29 How. 170), we overruled so much of the case of *Fox agt. Nellis* (25 How. 144), as held that the statement in a notice of appeal "that the judgment below is for too large a sum," was a sufficient compliance with the requirements of section 371 of the Code, and approved of the rule in *Forsyth agt. Ferguson* (27 How. 69), that "the notice of appeal should indicate clearly to the respondent the particulars in which the judgment should be modified; that it should specify, separate or distinguish, in a tangible form, the changes demanded, so that the respondent might know and comprehend what was asked; that terms of a general nature were not sufficient." And we further held, that where the appellant desired to avail himself of the advantages of section 371, if more successful on the appeal than in the court below, his notice should point out in plain, clear and specific language, the particulars wherein a modification was demanded, so that the respondent could know precisely what was claimed. In a recent case, *Gray agt. Hannah* (30 How. 155), the court went even further, and held, that "unless such a specification is made by the appellant, the respondent is not bound to make an offer."

A notice of appeal is the preliminary step to remove a cause from a justices' court into the county court. By section 353 of the Code, such notice is required to state the grounds for appeal and the error complained of. If it do so, and complies with the other requirements of the Code, the cause is transferred to the appellate court. If it is a ground of complaint that the judgment is for too much, or should in any particular be made more favorable, and the respondent desired to consent to such modification, under the penalty of paying costs if he do not, and the recovery is reduced, the notice, by the requirement of section 371, should set

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forth the particulars wherein the modification is desired. The notice of appeal is thus made to perform a double office, and where that is desired, the double purpose should be made distinctly to appear. A notice purporting only to state the grounds of appeal, without intimation of further claim, does not require an offer from the respondent at his peril, even though some one or more of the grounds of appeal, might be construed into a sufficient demand for a modification had that purpose been pointed out.

The intent of that particular provision of section 371, was to give parties an opportunity, if so disposed, to correct an unfair or unjust judgment, at their own option and without further litigation or expense. In *Forsyth* agt. *Ferguson* (*supra*), the court said, "the statute should be so construed as to render it a valuable and practical improvement; and unless the appellant is required to do something more than merely allege error as his ground of appeal, the statute becomes a trap and a snare, and defeats the object of its enactment." It is therefore but just and right, to require the appellant, in order to avail himself of this provision of the Code, fully to comply with all its requirements, and point out in his notice the particulars wherein modification is claimed, and in such a manner as to indicate that a reduction of the judgment is demanded. As was said in *Gray* agt. *Hannah* (*supra*), "a party who seeks to throw upon his adversary the hazard of further litigation, should take his ground and put the opposite party on his guard in clear, explicit and not doubtful language, in his notice of appeal."

The last legislature, in part, remedied the uncertainty of this section by an amendment, requiring appellants, if they intend to claim that the judgment is less favorable to them in amount than it should have been, to state what should have been its amount.

In this case the notice contained no specifications, other than stated, as grounds of appeal. No intimation was given that the judgment was claimed as more unfavorable than it should have been, if the respondent was to have judgment at all. The general feature of the notice of appeal was that

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the judgment below was erroneous and without evidence to support it, but that went to the whole judgment and not to a modification. The notice nowhere pointed out, or particularized, wherein the judgment should have been more favorable to the appellant. The ground *first* taken in the notice of appeal is to the jurisdiction; the *fifth* to error in admitting certain testimony; the *sixth* and *seventh* that the judgment was without evidence to support it, and all these are for reversal, go to the whole judgment and not to its modification. The *third* ground of error is, that the judgment was excessive; and the *fourth*, that there was not any evidence to warrant a judgment for plaintiff for a sum exceeding \$5. These were too general; in neither is anything particularized whereby the plaintiff could determine what was intended; it was not conceded that plaintiff was entitled to a judgment for \$5, or asserted that all above that sum was unjust. The *second* ground of appeal comes nearest to the requirements of section 371 of any; it alludes to an article as improperly allowed, but does not assert that it was allowed, or the extent of such allowance, or state how much should be the modification.

There was not, therefore, in this notice of appeal, sufficient to require an offer for a modification of the judgment from the respondent.

The plaintiff was the prevailing party on the appeal; the case was not within any of the exceptions to his recovery of costs, and he was therefore entitled to his costs of the action.

The order of the county judge is reversed, with \$10 costs of this appeal, and \$10 costs of appeal before the county judge.

POTTER, J., dissented.

Cutter agt. Reilly.

NEW YORK SUPERIOR COURT.

JOSEPH A. CUTTER, Receiver of the property of PETER REILLY
agt. PETER REILLY, MILES O'REILLY, and — O'REILLY,
wife of said MILES O'REILLY, and ANN REILLY, wife of
PETER REILLY.

In an action brought by a *receiver*, in supplementary proceedings, and in pursuance of the order appointing him, to set aside a conveyance of real estate made by the judgment debtor, to a third person, and the defendant succeeds on the trial, the *judgment creditors* of the debtor, who are not parties to the action, and took no part in its prosecution, are not liable for the *costs* of the action (*Following the decision in the case of Wheeler agt. Wright, 28 How. Pr. R. 228*). The law making parties in interest liable for costs, was not intended to apply to actions brought in the name of sheriffs, receivers, clerks or other officers of the court, although third parties might be interested in the recovery, unless the action was brought at the sole suggestion and urgency of such parties, and virtually conducted by them, and especially so, to a case where the action was brought by direction of the court.

Special Term August, 1866.

AN action was commenced on or about the month of January, 1863, by the above named plaintiff, as receiver of all the property of Peter Reilly, one of the above named defendants. The plaintiff, Joseph A. Cutter, was appointed as such receiver in proceedings supplementary to execution had in a certain action, wherein Peter Woods and John Woods were plaintiffs and Peter Reilly was defendant, and wherein a judgment in favor of said Peter Woods and John Woods, and against the said Peter Reilly, had been entered for \$91.09. The above entitled action was brought to set aside certain conveyances of real estate made by the said Peter Reilly, as fraudulent and void as against creditors. At the time of bringing the action, said Peter Woods and John Woods were judgment creditors of said Peter Reilly, and it was alleged that they were beneficially interested in any recovery which might be had in said action. The action was tried before Mr. Justice McCUNN in January, 1864, who found for the defendants herein, dismissing the complaint with costs against the plaintiff, and deciding that said con-

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veyances were not fraudulent and void as against creditors. The defendants' attorney caused, upon notice to the plaintiff, the costs of the defendants herein to be taxed at \$50.65, and a judgment therefor to be duly entered with the clerk of this court, and a transcript to be filed and docketed with the clerk of the city and county of New York. On or about the 7th of August, 1866, an execution was issued upon said judgment to the sheriff of the city and county of New York, for the collection thereof, which execution was subsequently returned by said sheriff, unsatisfied, for want of property of the defendants to satisfy the same.

Upon a statement of such facts, an order of Hon. JOHN M. BARBOUR, a justice of this court, was made on the 27th August, 1866, requiring said Peter Woods and John Woods, creditors aforesaid, to show cause at a special term of this court, on the 30th day of August, 1866, why they and each of them, should not be made liable for the costs recovered as aforesaid, against the plaintiff, and the payment of the same enforced by attachment, together with the costs of the motion, &c.

S. TUTTLE, *for defendants.*

D. M. PORTER, *for plaintiffs.*

ROBERTSON, Ch. J. This is a motion to compel judgment creditors to pay the costs of the defenses of a suit brought by a receiver appointed in a supplementary proceeding taken by them on execution against a judgment debtor. The Code provides (§ 321), that a person, of whom a cause of action shall become the property, after the commencement of an action upon it, shall be liable for the costs in like manner as if a party; and the Revised Statutes (2d vol. 619, § 44) and the Laws of 1849 (*chap.* 390), provides that a person "*beneficially interested*" in the recovery in an action *brought in the name of another*, shall be as much liable for costs as a plaintiff.

In the case of *Whitney agt. Cooper* (1 *Hill's R.* 632), it was held that persons holding a mortgage or lien were included

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in such definition. It was also held therein, that bringing an action might be by retaining an attorney, directly or indirectly, or engaging to pay his expenses, but it must be by some action on his part.

In *Colvard agt. Oliver* (7 Wend. R. 497), it was held that a *cestui que trust* came within the statute. In the first cited case, however, the court consider the statute intended to cover all cases where the interest of the party sought to be charged would be protected against the nominal assignee.

In the case of *Miller agt. Franklin* (20 Wend. R. 630), it was held that a person to whom a verdict had been assigned as collateral security, was not liable for any costs, and as the court strongly intimate, not even if he had taken part in the prosecution.

In *Bliss agt. Otis* (1 Denio's R. 656), and *Giles agt. Halburt* (2 Kern. R. 32), it was held that an interest to any extent in a recovery accompanied by interference and management of the suit, made the party interfering liable.

There is no evidence in this case of any interference by the judgment creditors in the suit, either by directing it to be brought or subsequently taking any active managing part in it. This alone would be sufficient to exempt from liability as having *brought* it, and they were not the only parties interested. The receiver had an interest in his commissions and costs, and was liable to any other parties for their share of any of the proceeds of any judgment.

But I think the law was not intended to apply to cases of actions brought in the name of sheriffs, receivers, clerks or other officers of the court, although third parties might be interested in the recovery, unless the action was *brought* at the sole suggestion and urgency of such parties, and it was virtually conducted by them, and especially so to a case where an action was brought by direction or leave of the court. The case of *Wheeler agt. Wright* (23 How. 228), is directly in point, and must govern this case.

Motion denied, with seven dollars costs. Order to be settled on two days' notice.

Graley agt. Graley.

NEW YORK SUPERIOR COURT

ROSINA GRALEY agt. JAMES GRALEY.

Where a defendant in an action of divorce is imprisoned for the non-payment of *alimony*, he can be relieved from imprisonment only under the provisions of the Revised Statutes (2d vol. p. 538, § 20, in relation to proceedings for contempts in civil actions, &c).

In this case the defendant on motion for a discharge, and for a reduction of alimony, was discharged on his paying the amount due for alimony for which he was committed. And on paying the amount accrued during his imprisonment, the order for alimony was reduced to \$10 per week.

Special Term September 10, 1866.

AN action was commenced by the plaintiff against the defendant for a divorce, *a vinculo matrimonii*, on the ground of adultery. The defendant did not appear or answer. Plaintiff's attorneys obtained an order of reference to take the testimony and report to the court, with opinion, &c. An *ex parte* order was made by the court upon affidavits, showing the amount of defendants' income for alimony *pendente lite* to the amount of \$12.50 per week. This was for some time punctually paid. The defendants' income having finally become much less than when the aforesaid order for alimony was made, he was unable to pay the amount ordered by the court, and therefore failed to comply with the order. An attachment was issued against him for contempt, and he was sent to Ludlow street jail. After remaining there a month, he was released by consent of plaintiffs' attorneys, on paying the amount for which he was committed, and costs. He did not pay the amount of alimony which accrued while he was in jail. A motion was then made upon affidavits, showing his imprisonment, and also a decrease in his income, and the ability of the wife to earn \$8 per week at her trade, for a reduction of the amount of alimony to be paid, coupled with a request to the court to remit the payment of the alimony which accrued during his imprisonment, on the ground that his imprisonment satisfied the order of the court. There has been no decree of divorce in the case; it is still before the referee.

Niblo agt. Binsse.

J. F. MILLER, *for defendant and for motion.*
BIRDSALL & BISGOOD, *attorneys, and*
THOMAS BISGOOD, *counsel for plaintiff, opposed.*

ROBERTSON, Ch. J. As to the application of the defendant to be relieved from paying the alimony already ordered, I think the court can only relieve him under the provisions of the Revised Statutes (2d vol. 538, § 20). When he makes a disclosure somewhat similar to other imprisoned debtors desiring a discharge, he simply denies his present ability to pay. The order for alimony was undoubtedly made on due evidence of his means. He has allowed the order to remain for over five months before he was attached, and even until the present time, some two months more, without asking for a modification. He had no right to dispose of his earnings otherwise, and leave his wife and children without the support ordered, and then ask the court as a favor to discharge him. The affidavits, however, disclose a diminution of income, and during his imprisonment he, of course, earned nothing. The order for his commitment may be discharged on his paying the amount due for alimony for which he was committed. The order for alimony during his imprisonment may be considered as suspended, and, on paying such amount, the order for alimony may be reduced to ten dollars a week.

SUPREME COURT.

WILLIAM NIBLO agt. JOHN BINSSE, executor, and LOUISA
LA FARGE, executrix of JOHN LA FARGE, deceased.

On appeal from an order of the special term *granting costs against executors*, where the judge, on the motion, finds that the application to the executors was sufficient, and that they should have *offered to refer*, the general term will not review his finding of facts on that question.

An *extra allowance* of costs against executors depends on the same inquiry as the question of the recovery of costs against them.

Where, after the entry of judgment against executors, the judge at special term

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decides the question of costs and an *extra allowance* in favor of the plaintiff, it is proper to have the order entered *nunc pro tunc*, as of the day of entering the judgment.

New York General Term September, 1865.

Present INGRAHAM, P. J., LEONARD and SUTHERLAND, Justices.

A MOTION was made by the defendants in this case at special term to set aside the costs entered in the judgment in this action against the defendants as executors, as irregular—costs not having been allowed the plaintiff by special leave of the court. The plaintiff made a cross motion for an extra allowance of costs, against the defendants, in addition to the general costs in the action. Judge INGRAHAM, before whom the motions were heard, made the following decision: “I think the application to the executors sufficient, and that they should have offered to refer. The motion is denied, and the order for costs, &c., to be entered *nunc pro tunc* is granted on payment of costs.” From this decision the defendants appealed to the general term.

T. J. GLOVER, *for defendants, appellants.* (*His Points on appeal from order granting costs nunc pro tunc.*)

I. It was irregular to enter judgment for costs against these executors, without special leave of the court. (*Mulherans' Executors* agt. *Gillespie*, 12 *Wend.* 355, citing *Potter* agt. *Ely*, 5 *Wend.* 74; *Palmer* agt. *Palmer*, *Id.* 91; *Nicholson* agt. *Showerman*, 6 *Id.* 554, and many other cases not reported; *Carhart* agt. *Blaisdell's Executors*, 18 *Wend.* 531, 532; *Knapp* agt. *Curtiss*, 6 *Hill*, 386; *Comstock* agt. *Olmstead*, 6 *How.* 77; *Stephenson* agt. *Clark*, 12 *How.* 282; *Proude* agt. *Whiton*, 15 *How.* 304; affirmed at General Term, 305, note; *Buckout* agt. *Hunt*, 16 *How.* 411, 412; *Mersereau* agt. *Ryers*, 12 *How.* 300.)

II. It is clear and evident, upon these papers, that the plaintiff had no right to recover costs. (2 *R. S.* p. 90, § 41, 1st ed.; 3 *R. S.* p. 176, § 46, 5th ed.; *Code*, § 317.)

1. There is no pretense that the plaintiff ever offered to refer.

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2. The defendants both testify that they never refused to refer.

3. *They were not bound to offer to refer.* It must appear that the defendants refused in the language of the statutes.

4. The rejection of the demand (if it had been unqualifiedly rejected) would not have been equivalent to a refusal to refer. (*Stephenson* agt. *Clark*, *Proude* agt. *Whiton*, *Buck-out* agt. *Hunt*, *supra*.)

5. The only application to them was by Hitchings, on 25th February, 1859; it was a demand of payment, and nothing more.

III. It was a palpable injustice on the hearing of the defendants motion, to set aside the irregular entry of costs, to make an order *nunc pro tunc*, allowing costs against executors, founded upon the plaintiff's affidavit, which the defendant never had any opportunity to answer (*Winne* agt. *Van Schaick*, 9 *Wend.* 448).

IV. The opinion given on the decision rests upon the supposed duty of the executors to offer to refer. The preamble to the order rests it upon our "*unreasonable*" resistance. Thus we are convicted of an offense which subjects us personally to the costs, without accusation, without notice, and without being heard.

V. The counsel who drew the order evidently thought the only ground for imposing costs was "*unreasonable resistance*;" he supposed we could be deemed to have refused to refer. It was certainly bold, if not fair, to draw the order in that form. It was entered without notice of settlement. It was not in accordance with the opinion, and must have been imposed upon the court.

VI. The allegations of unreasonable resistance is a bold pretense, without the slightest justification. We have recovered judgment twice in this case, once on the report of Judge Mitchell, and once at the general term.

The very ground of recovery shows that the executors could not safely have paid without resistance. In the language of Judge BROWN, it was their duty to resist to the utmost.

The defendants established a reduction of the original

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demand, \$211, which the plaintiff had omitted to credit. A part of the recovery, viz: \$969.50, except \$142, was not included in plaintiff's demand, nor in his complaint. Besides, it will be found that five years interest on \$2,600, will have to be deducted from the judgment. If there was no ground for resisting, how was it a difficult and extraordinary case?

Defendants Points on appeal from order for extra allowance.

1. The statute forbids the recovery of any costs against executors, unless payment was *unreasonably* resisted, or they refused to refer the claim under the statute. (2 R. S. p. 90, § 41, 4th ed.; Code, § 317.)

2. Extra allowance under the Code are a part of the allowances for costs, and are equally within the prohibition or exception relating to executors. Allowances are termed costs (Code, § 303); extra allowances are termed further allowances (Code, § 309; *Mersereau agt. Ryers' adm.* 12 How. 300).

3. No order having been obtained for the recovery of the general costs in the cause prior to the motion for extra allowance, no costs could be granted (*Mersereau agt. Ryers' adm.* 12 How. 300).

4. The referee had no power to allow costs. (*Mersereau agt. Ryers' adm. supra*; *Buckout agt. Hunt*, 16 How. 407, 411.)

5. The motion of the plaintiff was confined expressly to an extra allowance.

6. There was no pretense that the plaintiff had ever offered to refer, or that the defendants had refused to refer.

The affidavit of both defendants is positive that there never was any refusal to refer. Neither was there any pretense that the resistance to the claim was unreasonable.

The judgment on the report of Judge Mitchell, dismissing the complaint, and the affirmance of that judgment by the general term of this court, are conclusive on this subject apart from the facts of the case.

7. The order ought to be reversed, with costs.

E. P. COWLES, *for plaintiff, respondent.*

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By the court, LEONARD. J. The judge before whom this motion was heard at special term, found that payment had been demanded before action, and unreasonably resisted. I am unable to perceive that I can find the fact better than he. The facts were before him ; he passed upon them, and I cannot undertake to say that he found them incorrectly. It is not usual to review facts when they have been found by the judge who heard the motion.

The allowance, in addition to costs, depends on the same inquiry as the question of the recovery of costs.

The judge had the power to direct his order to be so entered as to prevent the necessity of another motion, or the useless proceeding of re-entering the judgment. Having decided the question of costs and allowance in favor of the plaintiff, it was proper to have the order entered *nunc pro tunc*.

I think the two orders appealed from should be affirmed, with \$10 costs.

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NEW YORK SUPERIOR COURT.

ELIZA J. BROWN, respondent agt. EBENEZER H. BROWN,
appellant.

An equitable action for the admeasurement of dower, is sustainable under the Code.

Courts of equity have always had jurisdiction, concurrently with courts of law in such actions.

If it be also an action of *ejectment* for the recovery of dower, there is no difficulty in the junction of the two. Courts of equity have always administered other equities in conjunction with such admeasurement.

But all the boundaries of jurisdiction and distinctions, between causes of action as legal or equitable being removed, there seems no reason, why all the relief to which the plaintiff is entitled should not be given in *one action*.

In an action to recover dower, where the court adjudge that the plaintiff is entitled to dower, it may appoint a *referee to admeasure the plaintiff's dower, and assess her damages by loss of rents and profits*, instead of the *three freeholders* formerly required in an action of *ejectment for dower*. (2 R. S. 312, § 48, sub. 1; *Id.* p. 310, §§ 36 to 47;) or a *special petition* (*Id.* 489, § 10).

Where a *referee* is appointed for the purpose of admeasuring and assigning dower, &c., the defendant waives every objection, except a want of jurisdiction and even a *right of appeal* from the order of reference, by litigating before the referee without such appeal, and by filing exceptions to the report.

On *appeal* also, such an error in the proceeding as admeasuring dower by a *referee*, instead of the *three freeholders*, should be disregarded, as not affecting the substantial rights of the defendant.

A plaintiff is entitled as dower, to *one-third* of the land according to its *value at the time of its alienation* by the husband; and is not to be allowed for any increase in value since, or any *improvements*. But the improvements may be assigned as a part of the dower provided they are not taken into account in *admeasuring* the dower; although if an assignment be otherwise practicable they are not to be included.

Where a referee has exercised his discretion in assigning *improvements* as a part of the plaintiff's dower, which decision has been passed upon by a judge at special term, such decision should not be disturbed on *appeal*.

In this case the *taxes* before the six years to which the inquiry of valuation of premises, &c., was limited, were properly excluded by the referee, as was also the rate paid for the use of *Oroton water* by the defendant. Also any amount paid for *ornamental work or repairs to the additions or improvements* was properly excluded.

THIS is an action under the Code (in the nature of a suit in equity), to recover plaintiff's dower in twelve lots of land and a dwelling house at Harlem, conveyed by plaintiff's husband in his life time to defendant, and occupied by the alienee at all times thereafter.

The complaint alleges these facts, and that the plaintiff

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Hundred and Twenty-fifth and One Hundred and Twenty-sixth streets, New York.

The action was tried before Hon. J. M. BARBOUR on the 28th day of October, 1863, and the justice found that plaintiff was entitled to dower, and that in November, 1855, and subsequently, she had demanded the dower of defendant, and that he refused to comply with the demand. That plaintiff was entitled to one-third of the rents from 27th day of October, 1855, up to the time of such finding, with certain deductions, and directed a reference to assign the dower and set aside particular lands.

An order of reference was thereupon made to D. P. Ingraham, Jr. The reference proceeded before Mr. Ingraham, who, on the 1st of September, 1864, made his report, setting aside to the widow the dwelling house upon the premises, with all its improvements, and three lots of land; and that plaintiff was entitled to receive \$679.15 for rents.

The report was sent back for a more specific report as to the value of the house and these lots.

A supplemental report was made November 29th, 1864.

These reports were confirmed December 5, 1864, and judgment entered accordingly.

I. The justice erroneously finds that demand of dower was made and refused in November, 1855.

The only evidence as to demand is contained at folios 11, 12, 26. The only positive evidence of demand is the written demand at fol. 26, which was made June 18, 1863.

II. The widow is only entitled to damages, or rents as damages, from the time of demand of dower; and the damages are not to be estimated on any improvements made after death of the husband (3 *R. S.* 5th ed. 33, §§ 20, 21).

The justice, therefore, erred in finding that the plaintiff was entitled to one-third of the rents from October 17, 1855.

III. The justice erred in sending the proceedings to a referee to assign the dower. There are but two methods prescribed by statute to recover dower.

1. Ejectment for dower (3 *R. S.* 5th ed. 592).

2. Proceedings by petition to the supreme court, county

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court or surrogate, for admeasurement of dower (3 *R. S.* 5th ed. 791).

In both these cases the statute expressly provides that "three reputable and disinterested freeholders" shall be appointed commissioners to admeasure dower. (3 *R. S.* 5th ed. p. 598, § 48, &c.; p. 792, § 13.)

Neither of these provisions is inconsistent with the Code of Procedure, and both still exist. There can be no question as to the existence of the action of ejectment.

And the other proceeding by petition is a "special statutory remedy, not heretofore obtained by action," and is saved by section 471 of the Code.

It will be seen that the referee has attempted to get over these provisions of the statutes, as he reports that he "took the deposition of three disinterested freeholders," &c.

IV. The referee erred in setting aside for the widow, the dwelling house. All the improvements made by defendant were upon the house, and in giving the house to the plaintiff she gets all these improvements, and the defendant gets vacant lots, without any allowance being made to him for the improvements.

V. The referee errs in finding that the only amount paid for taxes by defendant was \$52.94.

The evidence shows that defendant paid for taxes of 1857, \$89.62. Tax of 1859, \$103.61. And for Croton water taxes of 1857, 1858, 1859, 1860, 1861, 1862 and 1863.

The referee erred in striking out the evidence of payment of Croton tax. This tax was a lien on the property for the non-payment of which the property might have been sold.

VI. The referee should have allowed payments for insurance.

Insurance was necessary for the preservation of the property, and was as well for the benefit of the plaintiff as of defendant. And defendant expended for that purpose \$302.25.

MATHEWS & SWAN, *attorneys, and*

ALBERT MATHEWS, *counsel for plaintiff and respondent.*

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First. This is an equitable action to have dower assigned to the plaintiff. The complaint, and its prayer, is framed in the manner of a bill in equity, and is a proper mode of proceeding. (1 *Story's Equity Jurisprudence*, § 624 to 632; *Swaine agt. Perrine*, 5 *Johns. Ch. Rep.* 482; *Badgley agt. Bruce*, 4 *Paige Rep.* 98; *Townsend agt. Townsend*, 2 *Sandf. S. C. Rep.* 711; *Code of Procedure*, § 468.)

I. The Revised Statutes have not affected the equitable remedy for dower. They abolished only the legal writ of dower, and substituted therefor the legal action of ejectment (2 *R. S. p.* 343, § 34, and *p.* 303, § 2, *sub.* 2).

II. The plaintiff properly recovered the rents and profits, as well as the assignment of her dower in the same action. (1 *Revised Laws*, *p.* 57, § 20, *p.* 60, § 1; 1 *R. S. p.* 742, §§ 19, 20, 21; *Code of Procedure*, § 167, *sub.* 5.)

III. If there be any technical error the court must disregard it (*Code of Procedure*, § 176).

Second. The exceptions taken on the trial to the admissibility of evidence are frivolous.

I. The testimony was admissible under the issues.

II. The evidence could not have affected the judgment or prejudiced the defendant. (*Craig agt. Sprague*, 12 *Wend. R.* 41; *Belmont agt. Coleman*, 1 *Bosw. Rep.* 188.)

Third. The judgment was proper in form, and the exceptions thereto are immaterial. (*Hugh's Equity Draughtsman*, *p.* 827; *Swaine agt. Perrine*, 5 *Johns. Ch. R. p.* 482; *Williams agt. Cox*, 2d *Edw. V. C. R.* 178; *Stilwell agt. Doughty*, 2 *Brad. Surr. R.* 311.)

Fourth. This being an equity case, the exceptions taken upon the hearing before the referee after judgment, are not to be considered with the same strictness as in a bill of exceptions arising in an action at law. The judgment will not be reversed for technical error. It is enough if it is substantially right (*Forrest agt. Forrest*, 25 *N. Y. R.* 511).

Fifth. The report of the referee was in all respects just and warranted by the facts proved before him. So far as there was any conflict of evidence, his findings, and those of the court at special term, upon the matters of fact, are

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conclusive. (*Cohen agt. Dupont*, 1 *Sandf. S. C. R.* p. 262; *Mazette agt. N. Y. and Harlem R. R. Co.* 3 *E. D. Smith's R.* 98; *Pearson agt. Fiske*, 2 *Hilton R.* 146; *Skinner agt. Oettinger*, 14 *Abb. R.* 109; *Brooks agt. Christopher*, 5 *Duer R.* 216.)

I. The referee was bound to estimate the value of the property (on the diagram) as follows :

Six lots on One Hundred and Twenty-fifth street, No. 437 to 442, at \$1,900 each	\$11,400
Six lots on One Hundred and Twenty-sixth street, No. 399 to 404, at \$800 each.....	4,800
Dwelling house, exclusive of "improvements" by defendant.....	3,500
Other buildings, &c., exclusive of "improvements" by defendant.....	400
	<u>\$20,100</u>

Widow's share one-third, \$6,700.

1. The testimony of the plaintiff's witnesses furnished the only reliable criterion for determining their value.

(a) Samuel B. Kenyon, a *freeholder*, resident of Harlem for twenty years, dealer (buying, selling, mortgaging, renting,) in real estate for twelve years, gives the above estimate.

(b) Benjamin F. Raynor, resident of Harlem, *freeholder*, dealer in real estate in Harlem (buying, selling,) for many years, gives the same estimate.

(c) Walter Brady, also a resident of Harlem, *freeholder*, dealer in real estate for twelve years, gives the same estimate and a little more.

2. These estimates are opposed only by the defendant in person, whose opinions are unreliable.

(a) He is interested pecuniarily in the suit.

(b) His feelings appeared on the reference to be bitterly excited against the plaintiff.

(c) His judgment is naturally biased in respect to his own property and dwelling.

(d) His estimates and opinions are fanciful, and do not bear scrutiny or criticism. They were incapable of being

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made the basis of the referee's report. They were irreconcilable with the estimates of the disinterested witnesses.

3. The defendant values only the house and buildings, and does not controvert the valuation of the lots.

II. In setting apart a portion of the property, worth \$6,700, to the widow, the referee had a right to divide as he thought proper, and properly give her a life estate in that which will be available to her. The vacant lots would be useless to a life tenant. The defendant can easily keep his property by paying the widow a fair equivalent (2 R. S. 490, § 13; *White agt. Story*, 23 *Hill R.* 547.)

1. Adopting the estimates of the three disinterested witnesses, the widow was entitled to have the dwelling set apart to her, together with three lots on One Hundred and Twenty-sixth street, thus :

Dwelling house.....	\$3,500
Improvements	800
Three lots.....	2,400
	<hr/>
	\$6,700
	<hr/>

2. Even upon the estimates of the defendant himself, the widow should have the house, and at least the two lots upon which it stands, and one of the adjoining lots.

III. The referee, for the reasons aforesaid, was bound to adopt the testimony of the three disinterested freeholders, as to the value of the rents, during the period required by the order of reference, that is, from October 28, 1857, to October 28, 1863, as follows : Rent of dwelling for six years, exclusive of the increased rent by reason of improvements, \$700 per year, equal to \$4,200.

1. The three freeholders, Kenyon, Raynor and Brady, were competent to speak, and were disinterested.

2. The witness Dean was not competent to speak on the subject. He had no knowledge upon which to base an opinion. His estimate is purely fanciful and unreliable.

3. The estimate of the defendant is unsupported, and is extremely improbable on its face, and is open to the same observations as are made as to his other estimates.

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IV. From this amount the referee deducted all the "taxes" imposed on the premises, for the six years, between October 28, 1863, which had been paid by the defendant. But he could not deduct the penalty added by extraordinary interest for defendant's delinquency in not paying during the time allowed by law for that purpose, nor could he deduct "Croton water rates," which are not "taxes;" he also allowed for such repairs, as were necessary to "keep the premises in ordinary tenantable condition. But he could not allow for matter ornamental or matter of taste, nor for repairs to "gas fittings" or "plumbing," which were part of the defendant's additions and "improvements," and allowed as such in the valuation thereof.

V. It rested in the discretion of the referee, subject to approval of the court at special term, to determine the amount of land, &c., to be set apart as the widow's dower, and this matter is not properly the subject of review upon appeal (*Forrest agt. Forrest*, 25 N. Y. R. 514).

Sixth. There was no error of law in the report, and the exceptions thereto are not well founded.

I. The defendant's exceptions "First," "Fourth," "Fifth" and "Sixth," are made to matters of fact exclusively within the province of the referee, and fully sustained by the evidence, although conflicting.

II. The defendant's exceptions "Second," "Seventh" and "Ninth," are made to matters beyond the scope of the powers and duties of the referee, as prescribed in the judgment.

III. The defendant's exceptions "Third" and "Tenth," are made to matters properly determined by the referee, and therein he is fully sustained by the facts before him.

IV. The defendant's "Eighth" exception is in conflict with the report itself.

Seventh. The questions of fact arising before the referee were fully canvassed before the court at special term, upon the argument of the exceptions to the report. The decision of the court is conclusive as to all matters of fact (*Osborn's Administratrix agt. Marquand*, 1 Sand. S. C. R. 457).

Eighth. There was no error of the referee in the admission

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or exclusion of testimony to the prejudice of the defendant.

I. The evidence of payment of taxes which accrued prior to October 28, 1857, was beyond the six years embraced in the inquiry and were properly excluded (*See Exhibits No. 1 2 and 4, pp. 15, 16 and 18*).

II. The "rates" paid for use of Croton water were not "taxes." They were paid for the use of an article consumed by defendant. He might as well have proved the amount paid for the use of ice.

Ninth. The defendant is not entitled to any favor from the court. He had no defense to the action. Yet he put in an answer to procure delay, and under oath asserted the plaintiff had released her dower. After the judgment he protracted the reference for a whole year in a matter that might have been, and was in fact, heard at last in six days.

The judgment, therefore, should be affirmed, with costs.

Points on question of assignment of dower and of mesne profits.

1. This is an equitable action for dower and mesne profits.
2. The prayer for relief is for assignment of dower and rents, and other relief legal and equitable, and costs.
3. The answer denies the cause of action.
4. The action was tried by the court without dissent (*Greason agt. Kettletas, 17 N. Y. 498*).
5. The plaintiff proved all the allegations in the complaint. Neither plaintiff or defendant called witnesses to enable the court to set out the plaintiff's dower by actual metes and bounds, or to adjudge what were the actual rents, and what the deductions for taxes, repairs, &c. The proof on this head only went to establish the fact that there were certain lands out of which the dower should be admeasured, and rents or value of possession from which rents could be estimated by an account of them, and the deductions to be made therefrom, and that plaintiff was entitled to have both ascertained according to the practice of the court in like cases.

6. The defendant abandoning the alleged defense to the

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cause of action, and intending only to contest the *quantum* of dower and rents, offered no proofs whatever.

7. The court found in favor of the plaintiff upon all the *issues* embraced in the pleadings. The conclusions of law and fact determine every *issue* in the action, decide all the rights of the parties, and that the plaintiff is entitled to dower in specific lands, and rents thereof for a specific period; and settle the principles upon which the dower should be admeasured, and the rents apportioned and the account thereof taken.

8. The decision leaves no matter of detail unprovided for. It even adjudicates that, after the dower is set out, the defendant shall deliver possession thereof to the plaintiff "to be held and possessed by her during life," and likewise judgment for the rents when ascertained, and execution therefor, and that plaintiff shall have the costs of suit.

9. The judgment follows these findings of law and fact, and directs a reference to ascertain and report the dower and rents, and provides that when the report is confirmed such lands shall be deemed assigned to the plaintiff for life, and defendant shall give her possession, and defendant shall pay to plaintiff the rents and costs of suit, and she shall have execution to enforce the judgment.

10. The defendants acquiesced in this judgment and proceeded with the reference, and the referee's report has been filed and confirmed in all its parts.

11. Appeal is now taken more than one year afterwards from this judgment.

First proposition. If there was any "irregularity" in the judgment as respects the reference ordered in the judgment, it has been waived by the parties.

I. More than "a year" elapsed between the filing of the judgment and the giving the notice of appeal, or making this application (2 *R. S. p.* 359, § 2).

II. The parties have proceeded with the reference until it was completed, and the defendant has had the benefit of the delay. (*Forrest* agt. *Forrest*, 8 *Bosw.* 653, and 25 *N. Y. R.*

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510; *Clafin agt. Farmers' and Citizens' Bank*, 25 N. Y. R. 296.)

Second proposition. If there were any defect in the proceeding before the judge at special term, in matter of form, or in any respect other than touching power or jurisdiction, then, as neither party complains of it, and the "substantial rights" of neither party are affected thereby, the court must disregard it. (*Code*, § 176, and 2 R. S. p. 425, § 78; *Whitehead agt. Pecare*, 9 How. P. R. 35; *Bedford agt. Terhune*, 27 How. P. R. 422.)

Third proposition. The court can indulge in no presumption which will tend to invalidate the judgment. The party obtaining the judgment is entitled to every presumption necessary to sustain it. Numerous cases illustrate the extent of this clear rule of appellate courts. (*Otis agt. Spencer*, 16 N. Y. R. 611; *Viele agt. B. & T. R. R. Co.* 20 N. Y. R. 184; *Hoyt agt. Hoyt*, 8 Bosw. R. 521.)

I. "It is incumbent on the appellant to take care so to present the facts upon which the case depends as to show affirmatively that an error has been committed. The court will presume nothing in favor of the party alleging error." (*Carman agt. Pultz*, 21 N. Y. R. 551; *Lewis agt. Jones*, 13 Abb. R. 427; *Grant agt. Morse*, 22 N. Y. R. 323; *Heroy agt. Kerr*, 8 Bosw. 204; *Richardson agt. Dugan*, 8 Bosw. R. 212; *Lee Bank agt. Satterlee*, 17 Abb. R. 13.)

Fourth proposition. The judgment of the court at special term was final and complete in all respects.

I. It disposed of all the issues, and left no judicial function unexhausted in the justice who tried the cause.

II. The reference to admeasure the dower by metes and bounds and take the account of the rents, was merely a ministerial matter subject to the subsequent affirmance of the court.

III. The judgment was final, and became complete when the report was confirmed, and is identical in all its characteristics with those pronounced final and approved in form by this court, and the court of appeals. (*Swartwout agt. Curtis*, 4 Comst. 416; *Lawrence agt. Farmers' Loan and Ins. Co.* 15 How. 57)

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IV. The same form of decree was usual in chancery proceedings before the Code. (*Mills* agt. *Hoag*, 7 *Paige R.* 18; *Johnson* agt. *Everett*, 9 *Paige R.* 639.)

V. The cases where the courts have held judgments incomplete, not final, and amounting to a mistrial, have been where the court failed to determine all the issues presented by the pleadings, and are wholly distinguishable from this case.

1 (A. D. 1856). In the case of *Buchanan* agt. *Cheesborough* (5 *Duer*, 238), BOSWORTH, HOFFMAN, WOODRUFF, justices; the trial was by jury, and a verdict taken for a nominal amount, subject to the opinion of the general term, and a reference to ascertain the amount, if the verdict was sustained. This was held an "irregularity." No judgment was entered. The court say, however, when the cause is tried before the court, "no such difficulty exists."

2 (A. D. 1857). In *Griffin* agt. *Cranston* (1 *Bosw.* 181), DUER, BOSWORTH and SLOSSON, Justices: The suit was to set aside an assignment. The issues were tried by the court. The judgment left undecided whether a partnership ceased at a particular date or not, and ordered a reference to take an account. BOSWORTH, Justice, says: "The court should have disposed at the trial absolutely of all questions of liability, and the reference should have directed only such details to be ascertained as were necessary to be known to carry the judgment into effect."

3. In *Same Case* (5 *Bosw. R.* 658), before all the justices; the court say, "the decree does not purport to determine all the matters in issue. A question upon which the result of the litigation may depend is reserved, until the coming in of the report," &c. "It is not a cause in which every question on which the rights of the parties depend, is decided." &c.

4 (A. D. 1860). In *O'Brien* agt. *Bowes* (4 *Bosw.* 657), the trial was of an equitable action before the court at special term. The case finds that "all the proofs were given by the parties respectively, which they desired to give, and they rested submitting the case to the court for its determination."

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The court decided to dismiss the complaint with costs, "unless the plaintiff applied for a trial of the questions of fact by jury, in which event the question of costs was reserved." The plaintiff then got an order for a trial by jury. The defendant appealed from the latter order, and all of the first except the dismissal of the complaint with costs. The court held in effect that the judge had tried and decided the cause, by dismissing the complaint, and was thereupon *functus officio*, and his condition and subsequent order were void, and only these were reversed. But the judgment was permitted to stand in other respects.

5 (A. D. 1862). In *Chamberlain agt. Dempsey* (14 *Abb. R.* p. 241), there was a trial before a single judge. He decided the cause, but did not determine the question of costs, or the amount due, or direct a reference to ascertain it. A reference was ordered subsequently by another judge, without referring to this decision. The judgment was not entered upon the decision, but *ex parte* as upon failure to answer. It was all irregular and void.

6 (A. D. 1862). In the *Same Case*, BARBOUR, Justice, after a second trial before Justice MONCRIEF (15 *Abb. R.* p 1), decision was made for plaintiff, and a reference ordered to compute the amount due, but the question of costs was not determined. Subsequently to the reference a judgment was ordered by Justice MONELL, differing from the decision of Justice MONCRIEF, and giving the plaintiff costs. This was likewise irregular and void, and the court so held.

VI. If this was not a final judgment, then it was merely an interlocutory order as respects the reference, and the appeal therefore, should be dismissed upon the notice served, because not taken within the thirty days allowed by law. (*Lawrence agt. Farmers' Loan and Trust Co.* 15 *How. Pr. R.* 57; *Cotes agt. Carroll*, 28 *How. Pr. R.* 436.)

Fifth proposition. The court, at special term, had power and authority in this case to direct a reference to set out this dower, and compute the amount due for *mesne* profits.

I. This is an equitable action to recover dower, &c.

II. By the constitution of this state, the legislature has

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power "to alter and regulate proceedings in law and equity." (*Constitution of N. Y. art. 6 § 6, &c.; Phillips agt. Gorham, 17 N. Y. R. 272.*)

III. By the judiciary act (of 1847, § 77), this court has power given it to refer to a referee all matters formerly referred to a master in chancery. (*4 Edmond's R. S. 568, § 77; Knickerbocker agt. Eggleston, 3 How. Pr. R. 130.*)

IV. This superior court has full chancery jurisdiction, and the rules and principles governing courts of equity apply to proceedings in equitable cases in this court (*Forrest. agt. Forrest, 8 Bosw. 656 and 25 N. Y. R. 510.*)

V. By the Code (§ 468 *and* 469), all rights of action may be prosecuted in the manner provided by it. In case an action cannot be had under it, "the practice heretofore in use," may be adopted so far as necessary. Where consistent with it the former "rules and practice of the courts," in civil actions, "continue in force subject to the power of the respective courts to relax, modify or alter the same." So also by the rules of court (*Rule 93*), where no provision is made by statute, or the rules of court, the proceedings in suits like this must be "according to the customary practice as it heretofore existed in the court of chancery."

By virtue of these provisions various ancient rules of practice and modes of proceeding in law and equity have been retained, both by the court of appeals and the inferior courts; and the prior practice is held to be "abolished only in a qualified manner." (*Hastings agt. McKinley, 8 How. Pr. R. 175; Averill agt. Patterson, 10 Id. 87; Mills agt. Clark, 2 Bosw. R. 711; Palmer agt. Palmer, 13 How. Pr. R. 364; Bank of Genesee agt. Patchin, 3 Kern. R. 314; Wash. Life Ins. Co. agt. Lawrence, 28 How. Pr. R. 435.*)

VI. Whether then we regard this as a case of reference under the judgment to set out this dower, and to take the account of these rents as specifically provided for by the Code or not, there can be no question of the power of the court in the premises to act, either under the Code or under the former practice.

1. Every referee appointed under the authority of the

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Code, has "generally the powers vested in a referee by law," before the Code (*Code*, § 421).

2. This reference seems to fall precisely within the provision of the Code (§ 271, *sub.* 2), for "carrying the judgment into effect." (*Elmore* agt. *Thomas*, 7 *Abb. R.* p. 72; *Ketchum* agt. *Clark*, 22 *Barb. R.* 319; *Forrest* agt. *Forrest*, 8 *Bosw. R.* 656; *Same* agt. *Same*, 25 *N. Y. R.* 510.)

3. But, if this be doubtful or erroneous, there can be no question of the propriety of this reference under the former equity practice. (*Swaine* agt. *Perrine*, 5 *Johns. Ch. R.* 482; *Townsend* agt. *Townsend*, 2 *Sandf. R.* 711.)

VII. The prayer of the complaint was for equitable relief. The court had power to grant "any relief consistent with the case made by the complaint and embraced within the issue" (*Code*, § 275). The judge tried and decided every issue, and the reference was ordered merely as a customary mode of administering the relief to which the court adjudged the plaintiff to be entitled. The court decided the plaintiff entitled to dower and rents, and to a reference to ascertain the *quantum* thereof. The evidence adduced on the trial was insufficient, and was not intended to enable the court to determine this. There was no evidence as to *improvements* on the land, repairs or taxes. The case does not find, or purport to find, that the parties sought to have or could have had these matters determined on the trial. The proof concerning the same should have come from the defendants. They offered no proof whatever. A decision by the court as to the *quantum* of dower and rents on the evidence would have been impossible without great prejudice to the defendants. The reference was for their benefit. The court could not survey or set out the dower by metes and bounds. The reference was, therefore, necessary to prevent a failure of justice. Moreover, this court is bound to presume, if necessary, in order to sustain this judgment, as was the fact, that the parties designedly omitted to offer evidence as to these details, because they preferred to have the *quantum* of dower and rents ascertained by a reference ordered to carry the judgment into effect.

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By the court, ROBERTSON, Ch. J. It was adjudged in this case that the plaintiff was entitled to dower in certain land at Harlem, in the city of New York, lying between Sixth and Seventh avenues, and running through from One Hundred and Twenty-fifth to One Hundred and Twenty-sixth street, being one hundred and fifty feet wide, by about two hundred deep; and also to one-third of the rents of such land (after certain deductions), from a certain day in the year 1855, to the present time, exclusive of any arising from improvements on such premises made since their alienation. Judgment was rendered that the part of such land which should be set out by a referee (who was thereby empowered to set the same out for such dower), should be assigned to the plaintiff for the same, and that the defendant and all claiming under him, should deliver possession thereof to her; and that the defendant should pay to the plaintiff one-third part of the rents and profits of such land for six years next preceding the entry of such judgment, to be ascertained by the same referee; costs and an execution were also awarded to the plaintiff. Upon the report of such referee, duly confirmed after exceptions heard, judgment has been entered and the roll filed, from which, and such confirmation, an appeal has been taken.

The cases of *Swartwout agt. Curtis* (4 Comst. 416), and *Lawrence agt. Farmers' Loan and Trust Co.* (15 How. 57), show such judgment to have been in proper form. It corresponds with forms of decrees formerly made in courts of chancery (*Mills agt. Hoag*, 7 Paige R. 18; *Johnson agt. Everett*, 9 Id. 639), and was not infected with any of the vices of the judgments in *Buchanan agt. Cheesborough* (15 Duer, 238); *Griffin agt. Cranston* (1 Bosw. 181, S. C. 5 Bosw. 658); *O'Brien agt. Bowes* (4 Bosw. 657), and *Chamberlain agt. Dempsey* (14 Abb. Pr. R. 241, S. C. 15 Abb. Pr. R. 1.) In the first of those cases (*Buchanan agt. Cheesborough*) a conditional reference was ordered to ascertain an amount due, after the general term should pass upon the liability of the defendant, a general *pro forma* verdict having been taken against him. In the second (*Griffin agt. Cranston*), the first

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judgment (1 *Bosw.*) left a material issue of the time of cessation of a certain partnership undisposed of, and the second judgment did not purport to determine *all the matters in issue*. In the third (*O'Brien agt. Bowes*), a condition attached to a judgment of dismissal of the complaint, that the plaintiff was not to apply for a trial of the question of fact by a jury, was held to be repugnant, and rejected as surplusage. In the last (*Chamberlain agt. Dempsey*), the amount due on the mortgage sought to be foreclosed, was not determined on the first trial, but on an order of reference made by a different judge, and on a second trial, a judgment, without disposing of the question of costs was given and a reference ordered, on which a different judgment was afterwards rendered.

The present action is certainly sustainable as one in a court of equity for the admeasurement of dower, over which such courts always had jurisdiction concurrently with courts of law. (1 *Story's Eq. Juris.* §§ 624 to 632; *Badgley agt. Bruce*, 4 *Paige*, 98; *Townsend agt. Townsend*, 2 *Sandf. S. C. R.* 711.) If it be also an action of ejectment for the recovery of dower, there is no difficulty in the junction of the two. Indeed courts of equity have always administered other equities in conjunction with such admeasurement (*Swaine agt. Perrine*, 5 *Johns. Ch. R.* 482; *Bell agt. Mayor, &c. of New York*, 10 *Paige*, 49), and seem the more appropriate, and even exclusive tribunals in some cases of the kind. (*Van Dyne agt. Thayer*, 19 *Wend.* 162; *Cooper agt. Whitney*, 3 *Hill*, 95; *Baker agt. Chase*, 6 *Id.* 482; *Runyon agt. Stewart*, 12 *Barb.* 537.) The facilities for taking an account, in a court of equity, of the rents and profits, would seem to render an action of an equitable character, or in a court of equity, most proper. But all the boundaries of jurisdiction and distinctions between causes of action as legal or equitable being removed, there seems no reason why all the relief to which the plaintiff is entitled, should not be given in one action. Indeed, a court of equity when it has gained jurisdiction for one purpose, may retain it for other purposes, although they alone would not have constituted a

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primary ground of equity jurisdiction. The objection is therefore not one of jurisdiction, but of misjoinder of causes of action, and has been waived by not being taken by answer or demurrer. (*Code*, §§ 144, 148; *Bank of Utica agt. City of Utica*, 4 *Paige*, 399; *Ludlow agt. Simond*, 2 *Cai. C.* 156; *Truscott agt. King*, 6 *N. Y. R.* 147.)

But, although the action may be fairly in this court, and no objection has been made to an adjudication in it upon all the issues involved, it is said such court cannot use a referee to admeasure the plaintiff's dower, and assess her damages by loss of rents and profits, instead of the three *freeholders* formerly required in an action of ejectment for dower (2 *R. S.* 312, § 48, *sub.* 1; *Id.* p. 310, §§ 36 to 47), or a special petition (*Id.* 489, § 10).

The appointment of such freeholders under such statute, was clearly only a mode of supplying the defects of the machinery of a court of law, after giving judgment, in carrying it out, and to save the necessity of a new action or proceeding. Now, however, the only ordinary proceeding in a court to enforce or protect a right, or to prevent a wrong, is in the most general terms an "action" (*Code*, § 2). It can have but one form (*Code*, § 69). Every distinction between actions at law and suits in equity, and their forms, is abolished (*Id.*). Every court, therefore, whether exercising legal or equitable jurisdiction in such proceeding, now possesses the former powers of both courts of law and equity to investigate disputed questions by every mode peculiar to either, and to make its judgment as to the rights of parties effectual.

The Code expressly declares, that "all rights of action given or secured by existing laws, may be prosecuted in the manner provided by it" (§ 468). Every court has power, where an answer is put in to grant relief consistent with the case made by the complaint and embraced within the issue (*Id.* § 275). The court in this action had power, therefore, to admeasure and enforce the plaintiff's right of dower, if it determined that she had any under the case made. What part of the land the plaintiff was entitled to, as dower, as

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well as the amount due her for her share of the profits withheld, were specific questions of fact involved in the issue made by the pleadings, and were therefore proper subjects of reference, and their determination was necessary to carry the judgment into effect (*Code*, § 254). There surely could be no doubt of the power of the court in such an action to admeasure the dower *itself*, if it had sufficient materials before it, after acquiring jurisdiction over the subject. If so, it could transfer the inquiry to a referee to aid in ascertaining it. The defendant waived every objection, except a want of jurisdiction, and even a right of appeal from the order of reference, by litigating before the referee without such appeal, and by filing exceptions to the report. (*Caines agt. Wyckoff*, 1 *Cai. R.* 147; *Forrest agt. Forrest*, 8 *Bosw.* 653; *S. C.* 25 *N. Y. R.* 510; *Clafin agt. Farmers' and Citizens' Bank, Id.* 296). On appeal also, such an error in the proceeding as admeasuring the dower by one referee instead of three (as it does not appear that he was *not* a freeholder), should be disregarded, as not affecting the substantial rights of the defendant (*Code*, § 176).

The plaintiff of course was only entitled to one-third of the land according to its value at the time of its alienation in 1854 to the defendant, under the statute of 1806 (1 *R. L.* 1813, 60, § 1), and the Revised Statutes (1 *R. S.* 740, § 1; *Id.* 742, § 17; 2 *Id.* 490, § 13), and was not to be allowed for any increase in value since (*Walker agt. Schuyler*, 10 *Wend.* 481), or any improvements (*Coates agt. Cheever*, 1 *Cow.* 460).

No evidence was given of any change in its value to the time of the inquiry before the referee, or of any improvements put upon the premises, except upon the; house exclusive of the improvements, the house could hardly have been worth as much at the time of the trial as at that of the alienation. Omitting the house, the relative value of the lots remaining, to those assigned to the plaintiff, must most probably have continued the same between those dates. The use of the house at its present valuation, including the costs of improvements made by the defendant thereon, was

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assigned to make up the value of the one-third of the premises, exclusive of the valuation of the improvements on the house, assigned to her for dower. There is no rule of law forbidding absolutely the assignment of such improvements as part of the dower, provided they are not taken into account in admeasuring the dower, although, if an assignment be otherwise practicable, they are not to be included (2 R. S. 490, § 13, *sub. 2*; *Coates* agt. *Cheever*, 1 Cow. 460; *Bell* agt. *Mayor, &c. of New York*, 10 Paige, 42, 72); such improvements could not well be separated from the house. The propriety of the exercise of the discretion of the referee in that respect, was passed upon by the judge at special term, and his decision should not be disturbed (*Forrest* agt. *Forrest*, *ubi sup*). The other provision of the same statute (2 R. S. 490, § 13, *sub. 2*), was complied with by deducting from the lands allotted for dower, the value of the improvements.

Taxes before the six years to which the inquiry was limited, being before October, 1857, were properly excluded, as was the rate paid for the use of Croton water by the defendant. Any amount paid for *ornamental work* or repairs to the additions or improvements was properly excluded. There was no evidence that the defendant insured the plaintiff's interest in the premises, or anything more than his own, whether he or she could have recovered, if he had so insured, is doubtful (*De Longueman* agt. *Trademens' Ins. Co.* 2 Hall, 539): he was not entitled, therefore, to any premiums of insurance paid, unless shown to have been for the plaintiff's benefit. No errors of fact have been shown to have been committed by the referee.

The judgment and order confirming the report must, therefore, be affirmed, with costs.

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COURT OF APPEALS.

FREDERICK A. LAWRENCE and others, appellants agt. **THE BANK OF THE REPUBLIC**, respondent.

A *sheriff* has no standing in court to institute a *creditor's suit* to reach the *proceeds* of assigned property for the benefit of creditors, which he could not otherwise attach as the debtor's property.

Where an action was brought by the general *assignees* of judgment debtors, against a *bank* to recover a debt due them for money they had deposited to their credit as such assignees; and the bank set up as an off-set or counter-claim that it had obtained a judgment against the plaintiffs' assignors in an *attachment suit*; that an execution had been issued thereon and returned unsatisfied, and that the bank had a right to apply the moneys deposited by the plaintiffs in their bank towards the payment of their judgment—the sheriff having previously attached the funds standing upon the books of the bank to the credit of the plaintiffs, in the attachment suit in favor of the bank:

Held, that the bank was not entitled to retain the moneys to satisfy its judgment against the plaintiff's assignors.

The sheriff acquired no *lien* upon the funds by the service of the attachment. In *equity*, perhaps the bank might be adjudged to hold the proceeds of the assigned property in trust for creditors: but at law, the bank is the debtor of the plaintiffs in respect to such funds.

When the assigned property has been sold by the assignees, and its *identity* gone, the *proceeds* cannot be attached or levied upon by the sheriff as the debtors property; and setting aside the assignment simply, would not vest the title to such proceeds in the debtors.

A court of equity, in cases of *fraud*, follow the proceeds of the debtors property and afford a remedy by turning the legal owner of the funds into a *trustee* for the benefit of creditors. Such a suit lies against the judgment debtor and his assignees.

The defendants by their answer containing such *counter-claim*, and the service thereof, do not thereby take the position of plaintiffs in a creditor's suit, and acquire a *lien* in the same manner as they would by the institution of a creditor's suit: Such a defense is in the nature of an *equitable set-off*; and cannot be sustained on the ground that it is a *complaint* in the nature of a creditor's suit. Besides, in a creditor's suit against a judgment debtor, to set aside a prior assignment made by him in trust for the benefit of creditors, on the ground of fraud, the *judgment debtor* is a *necessary party*.

March Term, 1866.

THE plaintiff sued the bank to recover a debt due them for moneys they had deposited to their credit as assignees of Lanes, Boice & Co.

The bank put in an answer, setting up the fact that the assignors of the plaintiffs owed the bank; to recover which, the bank commenced an action in the supreme court, in

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which an attachment was procured under the 227th section of the Code of Procedure, upon the ground that Lanes, Boice & Co., the assignors, had assigned their property to defraud creditors, and that the sheriff had executed the attachment on, and attached the funds standing upon the books of the bank to the credit of the plaintiffs in this action.

It was further stated in the answer, that the bank recovered a judgment against Lanes, Boice & Co., for over \$128,000 in the attachment suit; that an execution had been issued upon the judgment and duly returned *nulla bona*. The defendants thereupon insisted that they had a right to apply the moneys deposited by the plaintiffs in their bank, as part payment of the forementioned judgment, and insisted upon this right by way of off-set or counter-claim. This action was tried in the superior court of New York, before a jury, and under the direction of the court, they found for the plaintiffs the amount due them from the bank, the judge having overruled the defense when offered in evidence.

Judgment having been entered upon the verdict, the defendants appealed to the general term of that court, which made an order reversing the judgment and granting a new trial, with costs to abide the event.

The plaintiffs appealed from that order to this court.

J. LABOCQUE, *for appellants*.

THOS. H. RODMAN, *for respondent*.

MORGAN, J. In my opinion, the Bank of the Republic is not entitled to retain the moneys of the plaintiffs to satisfy its judgment against the assignors.

It is conceded, in the opinion of the court below, that the sheriff acquired no lien upon the funds by the service of the attachment. In *equity*, perhaps the bank may be adjudged to hold the proceeds of the assigned property in trust for creditors, but at law, the bank is the debtor of these plaintiffs in respect to such funds.

The sheriff may doubtless attach any property which was

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transferred to the plaintiffs by the alleged fraudulent assignment, and hold it subject to the decision of the court upon the question of fraud. But in such case he must defend the seizure in behalf of the creditors, and show that the assignment was fraudulent as to the plaintiffs debt. As to creditors, the title to such property does not pass, if the assignment is fraudulent, but is liable to seizure to satisfy the plaintiffs debt.

The case is, however, different when the assigned property has been sold by the assignees, and its identity gone. The proceeds cannot be attached or levied upon by the sheriff as the debtor's property. Setting aside the assignment simply, would not vest the title to such proceeds in the debtors.

The only remedy of the creditor in such a case, is for him to institute a creditor's suit, and fasten a *trust* upon such proceeds for the benefit of creditors, which necessarily confirms the legal title of the assignees to the assigned property, instead of annulling it, as would be the case if the sheriff had seized the assigned property instead of the proceeds.

The various provisions of the Code in relation to attachments, are in harmony with these views.

By section 227, an attachment may issue when the debtor has assigned his property with intent to defraud his creditors. The right of the sheriff to hold it, depends upon his establishing the fraud as against the creditor, in whose behalf he has attached it.

By section 232, the sheriff is authorized, subject to the direction of the court, to collect and receive into his possession all debts, credits and effects of the defendants, and for that purpose to bring suits in his or the defendants name. Certainly there is no authority given in this section to bring a creditor's suit to reach the proceeds of the assigned property. The sheriff can only bring such actions as the defendant himself could bring, but for the assignment, except as against those who subsequently intermeddle with the property already attached by him. He cannot bring a suit to subject property to an attachment, which could not be otherwise attached. And by section 234, the attachment

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may be levied upon the right or share of the defendant in the stock of any association or corporation, and all other property of such defendant in this state; and by section 237, the sheriff is required to satisfy the judgment, if one is obtained, *out of the property attached by him.*

It is clear to my mind, that the sheriff has no standing in court to institute a creditor's suit to reach the proceeds of assigned property for the benefit of creditors, which he could not otherwise attach as the debtor's property.

The attachment suit may, therefore, be considered as of no consequence in the defense of this action.

The other ground upon which the defense is based, is, I think, equally untenable.

It may be conceded, that creditors could reach the funds by a creditor's suit, upon the theory that the assignees hold them in trust for creditors, by reason of fraud in the assignment. A court of equity in cases of fraud, follows the proceeds of the debtor's property, and afford a remedy by turning the legal owners of the fund into a trustee for the benefit of creditors. Such a suit lies against the judgment debtor and his assignees. An injunction may be obtained against the assignees to restrain them from disposing of the funds if there is any danger of their insolvency, although the institution of the suit itself would create a lien upon the funds which would be sufficient as against the assignees.

But here the assignees have not got the funds; on the contrary, the defendants have them in their custody, and attempt to withhold them before they have obtained any lien upon them by action or otherwise.

The defendants' counter-claim then, comes to this: that inasmuch as they have a right to commence a creditor's suit and obtain a lien, the funds may be detained from the plaintiffs in anticipation of such lien.

There is no more propriety in this than would be in allowing a bailee of personal property to refuse to deliver it up to the owner on demand, because the owner owed him a debt for which the property might be subsequently attached.

When this action was commenced, the defendants were

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clearly liable in debt for the funds which the plaintiffs had deposited in their bank, for at that precise time it is admitted they had acquired no lien upon these funds by the institution of a creditor's suit.

Now, when in the progress of this action did the defendants become entitled to retain these funds? The theory of the defense is, that by their answer they take the position of plaintiffs in a creditor's suit; and to follow out the analogy, it must be inferred that by the service of their answer they acquired a lien in the same manner as they would have acquired it by the institution of a creditor's suit.

The answer, it is said, contained a counter-claim in the nature of a complaint in a creditor's suit. There is something specious in this reasoning, but it strikes the legal mind as a very novel proposition.

1. I am of the opinion that a lien of the character mentioned, cannot be acquired by a defendant merely by putting in an answer, which shows that he is in a situation to institute a creditor's suit, through which he might ultimately be able to reach the debt sued for.

Such a defense is in the nature of an equitable set-off, and it is not claimed that it can be sustained upon that ground.

2. I am also of the opinion that the proper parties are not before the court to litigate the question. In a creditor's suit against a judgment debtor, to set aside a prior assignment made by him, in trust for the benefit of creditors, on the ground of fraud, he is a necessary party. Indeed, he must be deemed the principal party, otherwise different persons claiming portions of the assigned property could not be joined as defendants. The common point of litigation is the alleged fraudulent transfer of the property. (*Fellows agt. Fellows*, 4 Cow. R. 682).

3. It is said that such a defense is authorized by the Code to prevent circuitry of action. However desirable it may be to settle in one suit all the controversies between the parties which relate to the same subject matter, it is not proper to disregard the well settled forms of action to accomplish such a result, except when the statute plainly furnishes a new

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form of remedy. It is safer to abide by the old land mark of the law, than to try experiments in the expectation of finding a shorter road to the temple of justice.

The Code does not, I think, authorize such a defense by way of counter-claim. It provides that a defendant may interpose a defense constituting a counter-claim, provided such claim exists in favor of the defendant and against the plaintiff, and grows out of the plaintiff's claim, or is connected with the *subject matter* of the action (§§ 149, 150).

The defendants' claim, even if it could be regarded as existing against the plaintiffs, is not connected with the subject matter of the action. It did not grow out of it or arise out of the same transaction as between these parties. The *subject* of this suit is a debt which the defendant owed to the plaintiffs, and when recovered, the funds are just as liable to be subjected to the satisfaction of the defendants' judgment against the assignors as before. The *recovery of the debt in no sense changes the rights of the parties*, but leaves the plaintiffs to be proceeded against by other judgment creditors as well as the defendants, without the embarrassment of having the funds put beyond their reach, by a summary confiscation, for the benefit of these defendants. In case some other judgment creditor had first commenced a suit against the assignors and assignees to reach the proceeds of the assigned property, it would be a novel proceeding to interpose that fact by way of reply to avoid the counter-claim of these defendants.

It is very evident that a recovery by the plaintiffs in this action will not change the character of the funds in question; nor will it hinder or impair any remedy which the defendants or other judgment creditors may have, to reach them by any of the ordinary forms of action or proceeding which have been hitherto used for such purposes.

The plaintiffs have an undoubted right, as against the defendants, to the custody of the funds, until the assignment is set aside by action in a court of justice, in which action the assignees may be restrained from disposing of them.

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but there is no way by which the judgment creditors can have the use of them in the meantime.

The order of the general term of the superior court should be reversed, with costs, and the judgment entered upon the verdict affirmed.

SUPREME COURT.

EDWARD M. BROWN, plaintiff, respondent agt. THE KINGS COUNTY FIRE INSURANCE COMPANY, defendants, appellants.

Where papers containing *preliminary proofs* of loss by fire are served on and received by the insurance company, without objection, it is too late for the company *on the trial*, to object that these preliminary proofs were defective and insufficient ; especially so where the loss, when it became payable, was refused to be paid on the ground alone that the risk had been increased.

Where the defendants by their policy, insured the plaintiff against loss or damage by fire, on *his stock of drugs, chemicals and other merchandize*, "hazardous and extra hazardous,"

Held, that the policy did not become void, nor the defendants non-lia-ble, by reason of the plaintiff placing to warm upon a stove upon the premises about *five gallons of an inflammable compound, called ointment*, by reason of which the fire was occasioned.

It is usual for druggists to mix various kinds of ointment and to melt it on their stoves, as was done in this case ; and the insurers must be deemed to be acquainted with the business and to have included it in the risk.

If the risk had not been increased within the spirit of the conditions so as to avoid the policy, then it is no defense that the plaintiff might have been more careful in the management of a business which the policy permitted him to carry on.

New York General Term November, 1865.

Before INGRAHAM, P. J. ; LEONARD and BARNARD, *Justices.*

APPEAL from judgment at special term.

PROVOST & FISHER, *for appellants.*

STUART & VAN LOON, *attorneys, and*

SIDNEY H. STUART, JR., *counsel for respondents.*

The motion to dismiss the complaint, was properly denied.

I. If the preliminary proofs were not sufficient, the pro-

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vision requiring them being for the benefit of the defendants, by omitting to object to them, they waived all right to insist on the defects.

1. They received the verified proofs first furnished, without objecting to the absence of a notarial or magistrate's certificate, or to any other defect, and never apprised the plaintiff that they desired more minute information. This was a waiver of all defects in the preliminary proofs. (*Bumstead agt. Dividend Mutual Insurance Co. 2 Kern. R. 81, 97, 99; Bodle agt. Chenango Mutual Insurance Co. 2 Comst. R. 53, 57; O'Niel agt. Buffalo Fire Insurance Co. 3 Comst. R. 128, 129; Clark agt. N. E. Insurance Co. 6 Cush. R. 345; Underhill agt. A. Insurance Co. 6 Cush. R. 445.*)

2. The preliminary proofs were prepared under the instructions of one of the clerks of the defendants (*Bodle agt. Chenango Mutual Ins. Co. 2 Comst. R. 53, 58*).

3. The inventory, books and papers of the plaintiff, were left with the defendants, and returned to the plaintiff without objection. No objection was made to the account rendered to the defendants by the plaintiff, although two or three months elapsed before payment was demanded. All defects were thereby waived (*Same case*).

4. A personal inspection of the premises was made by the secretary, inspector and agent of the defendants, none of whom objected to the sufficiency of the preliminary proofs.

5. A defect in the preliminary proofs not having been pointed out at the time they were presented, so that the defect might have been supplied, any subsequent objection was offered too late. (*O'Niel agt. Buffalo Fire Insurance Company, 3 Coms. R. 122, 128; Bodle agt. Chenango Mutual Insurance Company, 2 Coms. R. 58.*)

6. The defendants, having based their refusal to pay the loss on another ground, namely, that the risk had been increased, they thereby waived all objection to the sufficiency of the preliminary proofs. (*Bumstead agt. Dividend Mutual Insurance Company, 2 Kern. R. 97, 99; O'Niel agt. Buffalo Fire Insurance Company, 3 Comst. R. 128; Etna Fire Insu-*

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rance Company agt. Tyler, 16 Wend. R. 402; 2 E. D. Smith, 286.)

7. The defendants having failed to object to the sufficiency of the preliminary proofs, before the commencement of the action, their conduct would operate as a fraud on the plaintiff, if the defense is upheld. Good faith on the part of the defendants required that, if they meant to insist upon a formal defect in the preliminary proofs, they should have apprised the insured of the nature of the objection, so as to give him an opportunity of supplying the defects, and their neglect to do so must be taken as a waiver of the defects. (O'Niel agt. Buffalo Fire Insurance Company, 3 Comst. R. 128; Bodle agt. Chenango Mutual Insurance Company, 2 Comst. R. 58; Clark agt. New England Insurance Company, 6 Cush. R. 345; 6 Haw. & Johns. 408, 410, 412.)

II. The defendants having, under the policy, insured the plaintiff against loss or damage by fire on his stock of drugs and chemicals, the plaintiff had a right to use, keep on hand, compound and manufacture all such articles as were necessary, or employed by him in his business as a druggist.

1. This is true, although the use or keeping of such articles was prohibited by the printed terms of the policy as extra hazardous. (Bryant agt. Poughkeepsie Mutual Insurance Company, 3 Smith R. 200; Harper agt. Albany Mutual Insurance Company, 3 Smith R. 197.)

2. The insurance upon the plaintiff's stock as a druggist, in the specified building, authorized the plaintiff to make drugs and medical compounds in the building, though drug making was classed as extra hazardous in the conditions of the policy. (Wall agt. Howard Insurance Company, 14 Barb. R. 383, affirmed in Court of Appeals, December, 1854.)

3. The term "stock of drugs," in the policy, includes, besides materials, all compounds and mixtures of drugs necessary to the plaintiff for carrying on his business as a druggist. (1 Phillips on Insurance, § 489.)

4. The plaintiff was, at the time the loss occurred, engaged in preparing an article, previously manufactured by him, necessary as a part of his stock of drugs, and used by him

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in his business as a druggist, and, consequently, the risk was not increased. The insurers must be supposed to have known what was the nature of the risk they had undertaken when they insured the plaintiff as a druggist, and in issuing the policy they must be deemed to have included all such materials and manufactures as the compound prepared by the plaintiff in the risk. (*Harper agt. Albany Mutual Ins. Co. 3 Smith R. 197.*)

5. That they did so is proven by the fact that the plaintiff was insured on his "stock of drugs, chemicals and other merchandise, *hazardous and extra hazardous*," and by the fact that they demanded and received the premium deemed by them adequate to the risk. (*Duncan agt. Sun Fire Ins. Co. 6 Wend. R. 488.*)

6. Even though the risk be held to have been increased by the act of the insured in the preparation of a medical compound as a part of his stock, still, inasmuch as the provisions of the policy were not violated, the insurers are liable. (*Stebbins agt. Globe Ins. Co. 2 Hall, 632; Billings agt. Tolland County Ins. Co. 20 Conn. 139; Young agt. Washington County Mutual Ins. Co. 14 Barb. R. 545.*)

III. Granting, for the sake of the argument, what we deny as a fact, that the plaintiff was guilty of negligence, still, that is no defense to this action. In the absence of fraud, the proximate cause of the loss is only to be looked at, and hence a loss within the policy, though occasioned by the negligence of the insured, is covered. (*Gates agt. Madison County Mutual Ins. Co. 1 Seld. R. 478, and the cases there cited; Matthews agt. Howard Ins. Co. 1 Kern. R. 14.*)

IV. The evidence shows that the plaintiff used all possible care in the preparation of the mixture; that the mixture had *previously been manufactured*, and that the plaintiff was only engaged in preparing it for boxing; that it was heated in a vessel called a water bath, such as is ordinarily used by druggists for heating their compounds; that the vessel was not more than two-thirds full; that the mixture was not combustible, and that but for an unforeseen and unavoidable accident, namely, the breaking of the stove upon which the

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mixture was being heated, no fire, and consequently no loss, would have taken place.

V. The judgment should be affirmed.

By the court, BARNARD, J. The objection taken upon the trial, that the certificate of the justice or notary did not accompany the preliminary loss of papers, was waived by the defendants' failure to object in time. The papers served were not only received without objection, but, when the loss became payable, the refusal to pay was upon the specific ground that the defendant "did not insure a ship chandler's shop," meaning that the risk had been increased, and upon this ground only. It is too late, now, to take any other. The defendant makes this objection also, upon the trial, that the policy became void by reason of the plaintiff placing to warm upon a stove, upon the premises, about five gallons of an inflammable compound, called ointment, by reason of which the fire was occasioned. The policy covers "stock of drugs, chemicals and other merchandise, hazardous and extra hazardous." The evidence clearly shows that it is usual for druggists to mix various kinds of ointment and to melt it on their stoves, as this was done, to put in boxes for sale and use. The insurers must be deemed to be acquainted with the business and to have included it in the risk (*Harper agt. Albany Ins. Co. 3 Smith R. 194*). The question of fact found, that the risk was not increased by the heating of this mixture beyond what is fairly contemplated by the policy and conditions, is fully supported by the evidence. In the absence of fraud, then, the insurance is against loss by fire. If the risk had not been increased within the spirit of the condition, so as to avoid the policy, then it will be no defense that the plaintiff might have been more careful in the management of a business which the policy permitted him to carry on (*Gates agt. Madison Co. Mutual Ins. Co. 1 Seld. R. 478*). The letter of the plaintiff was properly admitted, the proof being furnished by plaintiff that it reached defendants' company. It is true, the defendants' officers deny this, but it must all go to the jury. If the jury believe plaintiff, the

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letter is evidence. The evidence of what the defendants' president would charge for a risk like the one in question was properly rejected. The policy is not to be construed by what the defendant would charge for permission to insure to do as plaintiff did. The question was, did the act done increase the risk beyond the fair intent of the policy? It was proved directly by defendant that it did not increase the risk.

Judgment affirmed, with costs.

DIGEST

OF THE

POINTS OF PRACTICE,

AND

OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS.

31 *Howard's Pr. R.*; 44 and 45 *Barbour's R.* · 33 *N. Y. R.*
and 1 *Daly's R.*

ABATEMENT.

1. An appeal from a judgment in defendant's favor does not abate by the defendant's death (*Schuschar* agt. *Reimer*, 1 *Daly*, 459).
2. The sole defendant in an action having obtained a judgment in his favor, died pending an appeal therefrom, proceedings on the judgment being stayed in the mean time: *Held*, that the personal representatives of such defendant have a right to have themselves made parties to the appeal, and this should be done by motion to the court in the manner provided by section 121 of the Code of Procedure (*Id.*).
3. The cause of action in a replevin suit survives the death of the plaintiff, though not of the defendant, and the action may be continued in the name of the decedent's representatives in which case the sureties of the decedent on the replevin bond continue liable (*Lahey* agt. *Brady*, 1 *Daly*, 443).

ACCORD AND SATISFACTION.

1. Where the wife joins with her husband in executing a mortgage to se-

cure the payment of the reduced amount which the creditor agreed to accept in payment of the original demand, the pledge of her inchoate right of dower for such payment is sufficient to convert the transaction to an accord and satisfaction, by which the original claim is extinguished. Where money is due by the condition of a bond, and the defendant has a right to discharge it by bringing the principal and interest into court, an accord and satisfaction by parol may be set up against it (*Keeler* agt. *Salisbury*, 33 *N. Y. R.* 648).

ACCOUNT.

1. The defendant having pleaded an account stated, may elect to rely, upon the trial, upon the stating of the account, or he may fall back upon the accounts, and show that there is, in fact, a balance due him (*Goings* agt. *Patten*, 1 *Daly*, 168).
2. It is not inconsistent with the defense of an account stated, for the defendants to furnish a copy of the account upon which they meant to rely, in the event of their failure to prove the stating of an account. But the de-

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fendant having refused to deliver a copy of the account within the time which the Code allows after demand made: *Held*, that he will be deemed to have elected to rely upon the stating of the account; and on motion, plaintiff is entitled to an order precluding defendant from giving evidence of the accounts upon the trial (*Id*).

3. Where a party receiving an account keeps the same, and makes no objection to it, within reasonable time, he will be considered from his silence, as acquiescing in its correctness, and it will have the force of a stated account between the parties, binding as such upon both of them, presumptively (*Thursley agt. Denison, 45 Barb. 490*).
4. And if either party attempts to impeach the settlement and open the accounts for re-examination, the burden of proof rests upon him, and he must prove fraud, or point out clearly the error or mistake on which he relies (*Id*).

ACTION.

1. The assignee of stock already converted may maintain an action for the conversion, after a tender of the debt, and demand made upon the wrongdoer (*Genet agt. Howland, 45 Barb. 560*).
2. An action cannot be sustained as a case of interpleader where the plaintiff denies any liability to either of the defendants, and neither admits that any thing is due to one of them, nor offers to bring the amount in dispute into court (*McHenry agt. Hazard, 45 Barb. 657*).
3. An allegation that the defendants have fraudulently confederated and conspired together for the purpose of harassing the plaintiff by prosecuting separate suits against him for the same cause; and that such suits have been commenced and are prosecuted in pursuance of such conspiracy, is not sufficient to sustain an action or uphold an injunction, where the defendants claim adversely to each other, as well as to the plaintiff, and no direct fraud is charged; the plaintiff merely averring his belief of such conspiracy because the defendants have brought separate actions for the same cause, and by the same attorney (*Id*).
4. Proof, more direct than this, is necessary to sustain such an action. Fraud, in such a case, is not to be presumed, and the conspiracy should be distinctly averred, and not charged upon the mere belief of the plaintiff (*Id*).
5. Such an action, and the injunction granted therein, cannot be sustained on the ground that the plaintiff claims equitable and affirmative relief on his part. Nor on the ground that it will prevent a multiplicity of suits (*Id*).
6. Neither can the action be sustained by considering it an action in the nature of a bill of interpleader to prevent danger of a double recovery against the plaintiff (*Id*).
7. An action in the nature of a bill of interpleader, can only be sustained where the parties sought to be interpleaded have some right or interest in the subject matter of the action, which interferes with the plaintiff's attempt to establish his own rights (*Id*).
8. The law will not permit a party who has recovered in one action a portion of an entire demand, to make the residue of it the subject of another suit (*Bancroft agt. Winspear, 44 Barb. 209*).
9. To recover back money paid on an award obtained by fraud (*State of Michigan agt. Phoenix Bank, 33 N. Y. R. 9*).
10. The defendant collected a sum of money for S., with directions to pay the same to the plaintiff: *Held*, that this was equivalent to an express promise by the defendant to the plaintiff, to pay him such sum, and an action for money had and received by plaintiff was well brought: *Held, further*, that no consideration between plaintiff and S., need be shown. Under such circumstances, it is no defense that another party claims the same sum, but the money should be paid into court, and such third party brought in by way of interpleader (*Berry agt. Mayhew, 1 Daly, 54*).
11. The master of a vessel has a lien upon the freight and earnings of the vessel for the voyage, for advances and personal responsibilities necessarily made or incurred by him during the voyage, for the safety of the vessel, and the successful prosecution of the voyage; and this lien is assignable (*Sorley agt. Brewer, 1 Daly, 79*).
12. The plaintiff paid an assessment imposed on his property, which, by mistake of the collector of assessments, was credited to other property not owned by him: *Held*, that plaintiff could not recover back the money as being paid by mistake. The plaintiff having paid his assessment, the same is satisfied, no matter what entry may be made on the defendants' books: and the plaintiff has his remedy to enjoin the defendants from selling the property for non-payment of the as-

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assessment, or he may compel the defendants as an incumbrance or lien (*Purdue* agt. *The Mayor, &c.*, 1 *Daly*, 121).

13. In an action upon an undertaking given under section 356 of the Code, to obtain a stay of execution, after an appeal and affirmance, it is not proper to inquire at the trial whether or not the appeal had been perfected by the filing of the undertaking prescribed by section 354 of the Code. It is sufficient that the undertaking sued upon is in pursuance of a statute requirement; that it was in the form prescribed thereby, and that it was given in a case contemplated by the statute (*Sperling* agt. *Levy*, 1 *Daly*, 95).

14. It is sufficient to establish the plaintiff's right to recover in such an action, to prove the undertaking entered into by the defendants, the rendition of the judgment therein referred to, and the sheriff's return of the execution issued upon the judgment unsatisfied (*Id.*).

15. The distinction between legal and equitable actions, and the difference in the mode of conducting them pointed out (*Smith* agt. *Lewis*, 1 *Daly* 452).

ADMIRALTY.

1. A Court of Admiralty has jurisdiction, in all cases of wrongs complained of, committed on the high seas, or within the ebb and flow of the tide, where an action of case, or trespass on the case, might be maintained for such wrongs in a court of common law jurisdiction (*Smith* agt. *Wilson*, ante, 272).

2. The master of a ship or vessel stands towards women and minors, in the relation of a parent, especially so when they are unaccompanied by a natural guardian. And in the eye of the law, he stands to all his passengers in loco parentis. They are entitled as matter of right, to his attention and protection (*Id.*).

3. No man of blunted moral sense, or low intellectual range, or who does not possess a nice delicate sense of honor, or whose experience of life is narrow and meagre, should be allowed to occupy the position of master of a ship (*Id.*).

4. Where the master of a coast steamer suffered a notorious gambler—a passenger on his vessel, to decoy a young man of eighteen years of age, also a passenger, into playing upon a "sweat cloth," by which the latter lost \$750

of money belonging to his widowed mother: held, that the master was liable in admiralty, at the suit of the mother, for the whole amount of the money and interest (*Id.*).

AFFIDAVIT.

1. Assuming that an affidavit can only be taken before a notary, in the county where the notary resides, or in which he was appointed, yet if there is nothing to show that an affidavit was taken out of his jurisdiction, the presumption will be that he acted where the venue of the affidavit is laid, and that he resided there. Hence it is unnecessary for him to add to the signature of his name his place of residence (*Mosher* agt. *Heydrick*, 45 *Barb.* 549).

2. Clerks of counties being classed among the judicial officers, an affidavit taken before a notary public, may be used before any county clerk; and under section 384 of the Code, a judgment on confession may be entered with any county clerk, and not merely in the county where the statement authorizing it was verified (*Id.*).

AGREEMENT.

1. If a written agreement is signed by the party sought to be charged, and it is certain, fair and just in all its parts, it is not necessary that it should be signed by the party seeking to enforce it, in order to its specific performance. That is, the want of mutuality is no objection to its enforcement (*White* agt. *Schuyler*, ante, 38).

2. A written agreement to re-convey, at a certain time, for a valuable consideration, a certain number of shares of the capital stock of a "Steam Tow Boat Association," and to pay certain dividends received thereon, may be specifically performed, notwithstanding an objection that the contract relates to a class of property in regard to which it is not usual to direct a specific performance, on the ground that the party has an adequate remedy at law in damages. There may or may not be an adequate remedy at law, and besides the parties have specifically agreed to re-convey (*Id.*).

3. Where the time within which an agreement is to be performed is purely a question of fact, which has been considered with care by the judge at special term, the court at general term will not usually disturb the decision made thereon (*Id.*).

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4. A mutual agreement, by which persons interested in the reparation of a highway, promise to pay to one of their number the sums severally subscribed by them, to be expended for that purpose, is valid and obligatory; there being a consideration in the benefit to be derived from the completion of the work sufficient to support the promise to pay, accompanied by a request to do the work (*Van Rensselaer agt. Aikin, 44 Barb. 548*).
5. The person to whom the subscriptions are made payable, is the person through whose instrumentality the work is to be performed, if no other person is designated in the instrument for that purpose; and having assumed the work, and caused it to be completed, he has a right to demand payment, and authority to enforce the subscriptions. He has also a right to assign his interest in the agreement to another, and the assignee may sue thereon (*Id.*).
6. R. C. and G. C., executed the following agreement, dated May 8, 1861: "In consideration for value received, we promise to pay to W. F., four hundred and fifty dollars, provided a certain note with his name on, given to J. W., March 28, 1861, is not paid when due, and interest thereon." The note referred to was a note executed by W. F., for the benefit and accommodation of G. C. and G. H. P. It became due before the commencement of this suit upon the agreement, and remains unpaid. There was no consideration for the execution of the agreement by R. C., except as above stated: *Held*, that a breach of the agreement occurred by the non-payment of the note to J. W., when by its terms that note became due; and that on account of such breach, W. F. was entitled to recover the amount agreed to be paid, without first showing a payment by himself of the note to J. W.: *Held, also*, that the consideration for the agreement being past, and wholly executed, before the agreement was made, and R. C. being a stranger to the transaction, he was not liable upon the agreement (*Farnsworth agt. Clark, 44 Barb. 601*).
7. An actual parol agreement for the sale of land, accompanied by the payment of a portion of the purchase money, and a transfer of possession, constitutes an equitable title—particularly if that title be a mortgage—which the law will recognize (*Sahler agt. Signer, 44 Barb. 606*).
8. No excuse for the non-performance of a contract is recognized by the law, except where performance has been rendered impossible by the act of God, by the act of the law, or by the other party (*Niblo agt. Binsse, 44 Barb. 54*).
9. Accidental fire is not deemed so far the "act of God," as to be received as a legal excuse for the non-performance of a contract (*Id.*).
10. In legal acceptance, the act of God is such an act as could not happen by the intervention of man. Every other kind of impossibility the law requires of every man who contracts to perform any work for another, to provide against in his contract (*Id.*).
11. The plaintiff agreed to perform certain work and labor in shifting or moving the track of a railroad "under the direction" and "to the satisfaction" of L., the city surveyor, whose certificate that the work had been so performed was to entitle the plaintiff to payment. The plaintiff having completed the greater part of the work, was stopped at a certain point by L., who drove a stake, and directed that no work should be done beyond that: *Held*, that L. had power under the contract, to give that direction; and that having been given, it furnished the plaintiff with a sufficient excuse for non-performance of the remainder of the labor. And that it therefore became unnecessary to procure the certificate of L. that the contract had been entirely performed as a pre-requisite to his recovery (*Devlin agt. The Second Avenue Railroad Co. 44 Barb. 81*).
12. In March, 1853, T. was the owner of a piece of land subject to a mortgage to G., then in process of foreclosure, under the statute. Previous to the day of sale upon the mortgage, T. and M. agreed that M. should bid off the land, take the title thereto, pay the amount of the mortgage and costs, and execute to T. an agreement to convey the premises to him by the 1st of January, 1854, upon the payment by T. of the sum paid by M. at the mortgage sale, a small debt due from T. to M., and \$100; and that in case M. should be compelled to bid more than the amount due on the mortgage to secure the land, such surplus should be released by T. In pursuance of this agreement, M. bid off the land for a much larger sum than the amount due upon the mortgage and costs, which excess was released by T., and a written contract was executed by M., in accordance with the previous agreement between the parties: *Held*, that T. was entitled to

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redeem the premises upon the payment by him of the several sums mentioned in the contracts and interest, and the costs of an ejectment suit brought by M.; M. being charged with moneys received by him upon sales of portions of the land, and for timber sold, and with the net value of the use of the land and interest, allowed for improvements made (*Tibbs* agt. *Morris*, 44 Barb. 139).

13. The defendant, in September, 1862, wrote to one of the plaintiffs at New York, saying that he had a lot of hops to sell, and asking what he could get for them. The plaintiffs answered, stating the market price, and asking information as to the quantity, &c. The defendant replied, October 4, 1862: "If you can give me 12½ cents per pound at my place (North Chili), I will send them to you, after receiving a line from you. I have about 12,000 pounds." The plaintiffs answered by telegraph, October 11: "Will take your hops at offer. Ship them immediately. We write." On the 14th of October the defendant wrote, saying he was busy baling the hops; that he would ship on Monday of the next week. Perhaps he might on Saturday, but doubtful—Monday sure. If that would answer, "write immediately." On the 17th of October, the plaintiffs wrote: "It is not too late. Please ship on Monday, or just as soon as you can get them ready." On the 24th of October, the defendant wrote that he found he could not ship the hops in time to get the returns before he wanted the money, and that he could sell them at home, &c., The plaintiffs proved that they were ready and willing to pay for the hops in the city of New York, and that the defendant admitted, before the trial, that he had sold them: *Held*, 1. That if the letter of October 4th, and the telegraphic answer of the 11th amounted to a contract, the effect of the subsequent letters was to alter the proposed time of delivery to Monday, and to modify to that extent, the defendant's offer, but they in no way affected the other terms proposed. 2. That conceding that the letters taken together, made out a contract for the sale of the hops, the contract was, that the defendant would sell the plaintiffs about 12,000 pounds of hops at twelve and a half cents per pound, payable at North Chili, and would ship them on the succeeding Monday, or as soon as they could be got ready. 3. That in order to entitle the plaintiffs to a delivery of the hops, it was necessary for them to make a tender of the pur-

chase money. 4. That the delivery and payment were to be simultaneous. That nothing in the contract called for a shipment to New York, before payment, or allowed a payment anywhere else than at the place designated in the defendant's letter. 5. That until payment was tendered, the plaintiffs had not performed the contract on their part, and were not in a condition to require performance from the defendant. 6. That an offer by letter on the 24th of October, that if the defendant would ship the hops and send the plaintiffs the railroad receipt, they would send him a certified check, was not a valid tender; being an offer to make payment in a mode different from the terms of the original offer, and made after the time of delivery fixed by the letters. 7. That there was nothing, in the admission of the defendant that he had sold the hops, to relieve the plaintiffs from the obligation to tender payment; it not appearing when the hops were sold (*Aikin* agt. *Davis*, 45 Barb. 44).

14. The defendant executed the following contract, dated New York, October 8, 1863. "For value received, the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen (117) per cent, any time within six months from date, without interest. The bearer is entitled to all the dividends or surplus dividends declared during the time, to half-past one P. M., each day: *Held*, that the holder of the contract was not entitled to a dividend which had been declared and announced previous to the date of the contract, although at the time of its execution the stock was selling "dividend on" (*Lombardo* agt. *Case*, 45 Barb. 95).

15. *Held*, also, that the plaintiff would not be permitted to prove on the trial that by the general custom of brokers and dealers in stocks in the city of New York, the words "dividends or surplus dividends," in the contract, were intended to mean dividends declared on the stock, whether they had been announced before or after the date of the contract, provided that on the day the contract was made, the stock was selling in the market "dividend on," and not "ex dividend;" for the reason that effect could not be given to the custom, without making a new contract between the parties: *Held*, further, that the plaintiff could not recover the dividend as transferee of the stock, where there was no alle-

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gation in the complaint going to show that there was any debt or duty on the part of the defendant respecting it; or that he had received it, or in any way interfered with the plaintiff's right to it as a transferee of the stock. "Six months from date," cannot, by proof of any custom, be extended, or explained to mean, or include, "a day or two before date." (*Per SUTHERLAND, J. Id.*)

16. The plaintiff by an agreement in writing dated July 8, 1863, agreed to sell to the defendant a lot of land with a hotel thereon, for the sum of \$7,000, of which \$1,000 was to be paid on the first of August, then next, when a conveyance was to be made, and a mortgage given by the purchaser for \$6,000. The agreement contained the following provision: "Said party of the second part (the purchaser), also agrees to pay all taxes and assessments that shall be taxed and assessed on said premises from the date hereof, until said sum shall be fully paid as aforesaid." On the first of August the plaintiff conveyed the premises to the defendant, according to the agreement: *Held*, that by the provision in the contract respecting taxes, the parties intended the tax for the then current year, and that the plaintiff having been compelled to pay a tax assessed upon the property in November, 1863, he could recover the same in an action against the defendant (*Kern agt. Twissley, 45 Barb. 150*).
17. The defendant on purchasing a glass factory of E., including all its earnings during so much of a "fire" as had then elapsed, agreed with the vendor that he would pay the laborers the wages which had already accrued, as well as those which should thereafter accrue, during such fire: *Held*, that this was not a case affected by the statute of frauds; but that the defendant, having derived a benefit by means of the undertaking, and having funds placed in his hands for the payment of the indebtedness, which he had promised, in consideration thereof to discharge, was liable to a laborer for his wages during the entire "fire" (*Huber agt. Ely, 45 Barb. 169*).
18. A canal boat was sold by the plaintiffs to the defendants for a price agreed upon, and a bill of sale was executed and delivered, transferring the title. The boat being then engaged in transporting merchandise, the plaintiffs at the same time agreed, separately and apart from the contract of sale in reference to the trip the boat was then making, and the expenses thereof, that they would transfer to the defendants all the earnings of the boat during that trip, upon payment by the latter of all the expenses actually incurred by the plaintiffs: *Held*, that this agreement had no connection with the sale of the boat, or the transfer of the title to it, but related only to the earnings; and that parol evidence of its terms was admissible, notwithstanding the contract for the sale of the boat was in writing (*Silliman agt. Tuttle, 45 Barb. 171*).
19. C. leased certain premises to S. for the term of five years, subject to the following provision: "In case the said C. shall sell the said premises at any time after the first two years, he shall pay to the said S. fifty dollars, and allow him to gather the crops then sown or planted upon said premises, and S. to give it up to said C." *Held*, that it might fairly be inferred from this provision of the contract, that it was the intention of the parties that the \$50 should be paid only in the event of a sale of the premises to a third party; and that the sum named was not recoverable upon a sale to S. himself (*Seaman agt. Oviell, 45 Barb. 267*).
20. P. by a written contract with S., agreed to enlist a specified number of recruits for the army, to the credit of a town, for the price or sum of \$350 each, in full of bounties, premiums, &c., which sum S. agreed to pay him therefor: *Held*, that P. could maintain an action on this contract, notwithstanding the act of the legislature passed February 10, 1865, prescribing the amount to be paid for substitutes (*Laws of 1865, ch. 29, §§ 3, 4*). (*Powers agt. Shepard, 45 Barb. 524*).
21. Where the title to property owned by several persons jointly, is for business convenience, in the name of one of the owners, who sells the property in his own name, but for the benefit of all, executing a bill of sale in his individual name, the contract enures for the joint benefit of all the owners, and all may sue upon it. And this, although the purchaser was ignorant of the fact that any other persons than the one with whom he contracted were interested in the property (*Silliman agt. Tuttle, 45 Barb. 171*).
22. Joint owners of property have a right to avail themselves of the acts of one of their number as their agent; and whether he acted with or without authority in negotiating a sale of the property, and in using his own name, only, makes no difference (*Id.*).

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24. Where an attempt is made to create a lien which shall have precedence of all others; the agreement for that purpose being founded in a good and valuable consideration, and the parties undertaking to give it effect in good faith; but the attempt fails because of the failure of the machinery upon which they relied, through a defect in a statute, it is the plain duty of a court of equity to supply the legal formalities necessary to secure to the party the rights intended to be secured to him by the agreement (*Lanning* agt. *Tompkins*, 45 Barb. 808).

25. C. confessed judgment to L., it being expressly agreed that it should have preference over a judgment in favor of S. and others, confessed at the same time, and all other claims, and that it should be first docketed, in order to secure to it such preference and priority. S. and others had notice of this agreement, and assented to it, and in consideration of it, L. incurred new liabilities for and on account of C. Both judgments were entered and docketed in Schuylér county, which all the parties then supposed had been legally erected and organized as a county. L.'s judgment being first in point of time. Execution was afterwards issued upon L.'s judgment, and the property of C. seized by virtue thereof, by the person elected as sheriff of the supposed county. Proceedings upon this execution were stayed by order of the court, and the courts afterwards held and decided that the statute by which said county was attempted to be erected and organized, was unconstitutional and void. Consequently L.'s judgment not being docketed in a proper place, was never perfected and ripened into a final judgment, upon which a valid execution could be issued: *Held*, that the equity powers of the supreme court were sufficient to give force and effect to this agreement, and to cause it to be executed according to the intention of the parties, notwithstanding the failure of the legal means and instrumentalities through which they designed it should be done: *Held, also*, that although the statute was found to lack the constitutional force and vigor, necessary either to beget, or to uphold and maintain the body of a legitimate county organization, the agreement still remained and continued a valid subsisting agreement, capable of being enforced and executed, depending in no respect for its binding force upon the validity of the statute by which the county was sought to be organized (*Id*).

25. In case of a failure of consideration, a party to a contract may hold the same rescinded, and may recover back whatever money he has advanced upon it, in an action for money had and received (*Smith* agt. *McOluskey*, 45 Barb. 610).

See CONTRACT.

ALIMONY.

1. Where a defendant in an action of divorce is imprisoned for the non-payment of *alimony*, he can be relieved from imprisonment only under the provisions of the Revised Statutes (2d vol. p. 538, § 20, in relation to proceedings for contempts in civil actions, &c) (*Graley* agt. *Graley*, ante 475).
2. In this case the defendant on motion for a discharge, and for a reduction of alimony, was discharged on his paying the amount due for alimony for which he was committed. And on paying the amount accrued during his imprisonment, the order for alimony was reduced to \$10 per week (*Id*).

AMENDMENT.

1. The power of the court to allow amendments to pleadings has not been enlarged by the Code. The act concerning amendments and jeofails, passed in 1788, and incorporated into the Revised Laws of 1818, gave the same general power; and the Revised Statutes allowed amendments either in form or substance, for the furtherance of justice (*Woodruff* agt. *Dickie*, ante, 164).
2. Neither at common law, nor under any of the previous statutes, did the courts ever claim the power, to allow an amendment to any existing pleading, by the insertion of a new and different cause of action or defense (*Id*).
3. The clause of the Code which allows an amendment "by inserting other allegations material to the case," does not extend the power over amendments setting forth a new cause of action or defense (*Id*).
4. An amendment is the correction of some error or mistake in a pleading already before the court, and there must therefore be something to amend by. Whereas, the insertion of facts constituting a new cause of action or defense, would be a substituted pleading, and not an amendment of an existing pleading. There are no cases which furnish a satisfactory reason for

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holding such an amendment to be within the power of the court to grant (*Id.*).

5. There is nothing in the Code increasing the power of amendment beyond that which had previously been exercised by the court, and the decisions prior to the Code should prevail (*Id.*).
6. Section 272 of the Code provides that referees "shall have the same power to grant adjournments and to allow amendments to any pleadings, and to the summons, as the court upon such trial, upon the same terms and with the like effect" (*Id.*).
7. The words "as the court upon such trial" inserted in this section would seem to be unnecessary, inasmuch as the court has no other greater or less power "upon the trial," in respect to amendments than at special term, or in banc, or otherwise (*Id.*).
8. There is no distinction between the powers of the court while sitting in different branches. It is enough that the court may amend any pleading, and that the power is not limited to any branch or part of the tribunal. All the powers of the court may be exercised by a single judge while sitting as a court, except when the power is confined to the court as a collective body. All statutes conferring jurisdiction give it to the court, and not to the members composing the tribunal (*Id.*).
9. There is no doubt that as regards the allowance of amendments of pleadings, a judge presiding at the trial of a cause with a jury possesses all the powers of the court, and can allow them in the same manner and with the like effect as the court sitting in any other organized form (*Id.*).
10. Referees are no longer officers of, or under the control of the court. They become by appointment an independent tribunal having such powers as are given by statute, and their decisions are reviewable only on appeal from their judgments (*Id.*).
11. Referees now possess all the powers of the court, and their allowance or disallowance of an amendment can only be reviewed, if reviewable at all, in the manner other decisions are reviewed on appeal (*Id.*).
12. The general term of the supreme court, have the power, on appeal, in an action for partition, to order the amendment of the petition of a committee or guardian of a non-resident infant lunatic defendant, sworn to in another

state, and presented here for the purpose of the appointment of a guardian *ad litem* in the action, to the effect that such infant lunatic ward was at the time of verifying his original petition, residing with the committee, the petitioner, or under his charge or custody (*Rogers agt. McLean, ante, 279.*).

13. Also, ordering the amendment of the jurat or certificate of the judge attached thereto, stating the place where such petition was verified, and the affidavit taken; and, also, an amendment of the certificate of the clerk, so that it shall, in addition to its present contents, certify to the existence of the court, and the genuineness of the signature of the judge, which amendments when made, shall be deemed to be made and filed *nunc pro tunc* (*Id.*).

ANSWER.

1. Where an answer, instead of directly denying a material allegation of the complaint, contains a version of the transaction which is in some respects inconsistent with the allegation, this will not amount to a denial, so as to prevent the allegations of the complaint from being taken as true (*West agt. American Exchange Bank, 44 Barb. 176.*).
2. An allegation in an answer, by which it is attempted to deny a material averment in a complaint, may be general or specific, at the option of the pleader; but in either case it must be direct and unequivocal. If it merely implies that the allegation is controverted, or justifies an inference that such is or will be claimed to be its effect, it will not be construed as a denial (*Id.*).
3. In an action to recover for work and labor done by the plaintiff for the defendants, the answer, after admitting the performance of the labor, set forth, secondly for a defense to the demands stated in the complaint, that the defendants, during the time of the performance of the labor, had paid divers sums of money to and for the plaintiff, to apply in part payment on and for his said labor and services, specifying the amount. It then claimed that the plaintiff was indebted to the defendants for the said sums of money, and alleged that the defendants would insist upon the sums so paid, as a counter-claim, or counter-claims in the action, and demanded judgment for costs: Held, that the answer did not set up a counter-claim, so as to require a reply, but that the facts pleaded

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constituted the defense of *payment*, only; and that, therefore, although there was no reply, the whole answer did not stand admitted (*Burke* agt. *Thorne*, 44 Barb. 363).

4. Held, also, that if the construction of the answer were a matter of serious doubt, the old common law rule, that a pleading, in matter of substance, is to be construed most strongly against the pleader, should prevail (*Id.*).

5. Where an answer is susceptible of being construed to contain either of two defenses, one of *payment*, and the other a *counter-claim*, the answer should be construed as setting up only the defense of payment, and not considered as containing a *counter-claim*, and therefore requiring a reply (*Id.*).

APPEAL.

1. An appeal from a surrogate's decree of distribution must be taken in *three months* therefrom, although it does not make a final distribution of the whole estate (*Anthony* agt. *Brouwer*, ante, 128).

2. However members of the court, at general term, may be disposed to question on a record of appeal, the decision made in the same case, at a previous general term, unless such appeal presents facts different from those on which the former decision was founded, the judgment appealed from should be the same as before (*Freeman* agt. *Auld*, 44 Barb. 14).

3. Whether an appeal to the county court from a judgment of a justice of the peace is invalid or irregular because no revenue stamp was put upon one of the notices of appeal served, instead of the one kept by the appellants' attorney, is a question not properly before the supreme court, on appeal from the judgment of the county court, in the cause, unless an appeal has been taken from the order of the county court denying the motion to dismiss the appeal to that court (*Armstrong* agt. *Smith*, 44 Barb. 120).

4. A verdict should not be set aside merely because the court would have come to a different conclusion from that of the jury, on the force and weight of the testimony. While the court on review, may, and should, set aside a finding of fact if it be plainly against the weight of evidence, it certainly should not go beyond that point to interfere with the decisions of fact fairly deducible from conflicting testimony (*Fleming* agt. *Smith*, 44 Barb. 554).

5. Although, at the trial, evidence of certain admissions of defendant's agent may have been improperly admitted, yet where it worked no injury to the defendant, the action being abundantly sustained without it: Held, that, on appeal, it will be rejected as immaterial matter, and the objection and exception to its admission may be disregarded (*Benedict* agt. *Ocean Ins. Co.* 1 Daly, 9).

6. Where, on an appeal from a judgment, by the defendant, to the general term, the facts were agreed on by the parties, and could not be varied by any evidence which might be adduced on a new trial, and a reversal was had: Held, that final judgment for defendants should be given on such reversal (*Peterson* agt. *Walsh*, 1 Daly, 182).

The question of care and vigilance is one of fact for the tribunal which tries the case, and its finding will not ordinarily be disturbed on appeal (*Morris* agt. *Third Ave. R. R. Co.* 1 Daly, 202).

8. Where the review and reversal of a judgment by the ultimate appellate tribunal was a nullity, because the appeal was not taken in a way that entitled the court to hear it, but for which the appellant was not responsible: Held, after nine years of acquiescence and repose by the party who recovered the original judgment, that he would be restrained by a court of equity from enforcing it, unless he consented that an appeal might then be brought with the same effect as if it had been brought within the time prescribed by law (*Jacobs* agt. *Morange*, 1 Daly, 523).

9. Where a court has not jurisdiction of the subject matter, the consent of parties will not confer it; but a consent that an appeal may be brought after the time has elapsed for bringing it, is not liable to that objection. The appellate court having the general power to review judgments upon appeal, such a consent does not confer it, but it is a mere waiver of the right to insist that the time has passed for bringing the appeal (*Id.*).

10. A motion cannot be entertained at special term to dismiss an appeal from an order made at special term. In such a case the motion to dismiss the appeal must be made at the general term. A motion to dismiss an appeal from the marine or justices' courts to this court, however, should be made at the special term (*People ex rel. Larocque* agt. *Murphy*, 1 Daly, 462).

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11. An order granting or denying a motion to open an inquest cannot be reviewed on appeal by the general term (*Farish* agt. *Corties*, 1 *Daly*, 274).
 . Where the issues in an equitable action are tried by the court, but a further inquiry is necessary before judgment, the entry of the decision of the court upon the issues, with the direction for the further proceedings, is an order involving the merits, from which an appeal may be taken to the general term. The cases of *Bently* agt. *Jones* (4 *How. Pr.* 335); *Ring* agt. *Stafford* (5 *Id.* 30); and *Lawrence* agt. *The Farmers' Loan & Trust Co.* (15 *Id.* 57; 6 *Duer*, 689), examined and dissented from (*Smith* agt. *Lewis*, 1 *Daly*, 452).
12. To enable a party to review, upon an appeal from such an order, the decision of the judge upon the trial of the issues, a case may be made within ten days after notice of the decision (*Id.*).
13. Where a jury trial is waived in an action upon contract, or in other actions, by the assent of the court, judgment is entered up upon filing the conclusions of the judge, and his decision upon the trial in such a case can be reviewed only by an appeal from the judgment (*Id.*).
14. The general term of the supreme court have jurisdiction of an appeal to the chancellor from the decision of a vice chancellor, declaring the rights of the complainants, and referring the matters to a master for the proper accounting, which appeal was pending at the time the court of chancery was abolished by the constitution, &c., in 1846 (*Green* agt. *Givan*, 83 *N. Y. R.* 843).
15. Where the general term orders a new trial, both upon the law and the facts, that opens the question for the consideration of this court, whether the general term was right in holding that the court at circuit erred on questions of fact (*Beebe* agt. *Mead*, 33 *N. Y. R.* 587).
16. Where there is no testimony, on the trial, in support of a material allegation of the complaint, yet the defendant proceeds, without raising any objection on that account, to introduce evidence on his side, the absence of such testimony cannot be insisted on upon appeal (*The People* agt. *The Third Ave. R. R. Co.* 45 *Barb.* 63).
17. On appeal to the supreme court from a decree of a surrogate denying probate of an instrument propounded as a will, the court, if it deems the decree against the evidence, is not bound to award a feigned issue to try the questions of fact, but may direct such judgment and decree to be entered as the surrogate should have made (*Pilling* agt. *Pilling*, 45 *Barb.* 86).
18. An appeal from an order denying a motion for a new trial, made on the judge's minutes, may be taken, either before or after the judgment has been entered (*Lane* agt. *Bailey*, 45 *Barb.* 119).
19. Should the verdict be set aside, on the appeal, the special term can, on motion, vacate the judgment, as it will then have no foundation (*Id.*).
20. Where an appeal is taken from a judgment and there has been an appeal, also, from an order denying a motion for a new trial, on the judge's minutes, the better course is to hear both appeals argued on the appeal from the judgment (*Id.*).
21. At what time notice of a judgment may be given, for the purpose of limiting the time within which an appeal may be taken (*Sherman* agt. *Postley*, 45 *Barb.* 348).
22. Where the form of a judgment had been drawn up and settled before the judge who tried the cause; and he had directed the clerk, in writing, to enter it, and had signed it with his initials, according to the customary practice, but the judgment roll had not been made up and filed: *Held*, that while the judgment remained thus incomplete, notice of it could not be given to the unsuccessful party which would have the effect to limit his time for appealing (*Id.*).
23. An offer, by the respondent, to let a judgment appealed from be corrected, by deducting therefrom a specified sum, cannot be given in evidence on the hearing of the appeal, where it is used for a purpose wholly unauthorized and well calculated to prejudice the appellant's case; as where, previous to the introduction of the offer, the counsel for the respondent stated to the jury that the offer was made because the appellant had no confidence in his case; and neither the court nor the counsel informed the jury of the proper effect, of the offer, upon the question of costs (*Finney* agt. *Veeder*, 45 *Barb.* 388).
24. An order of the general term of the supreme court striking a cause from the calendar on motion of adverse defendants, against whom no appeal from the judgment of the special term had been taken, is not appealable to

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- this court. So with an order affirming the special term, denying a motion to set aside a judgment for alleged irregularity. *It seems*, the orders below were properly made (*Cotes* agt. *Smith*, ante, 146, *Court of Appeals*).
26. This court will not on appeal against the plaintiffs in an action review the judgment below, so far as it affects adverse defendants against whom no appeal was taken from the special to the general term (*Id.*).
27. A point which is waived and not argued by counsel at the hearing of the appeal, ought to be examined by the court on their own motion, if any member deems it a material ground for granting a new trial (*Artisans' Bank* agt. *Backus*, ante, 242).
28. On an appeal from a judgment in a justice's court, under section 371 of the Code, the respondent must be responsible for the offer he makes to allow the judgment of the justice to be corrected, without regard to the extent the appellant claims in his notice of appeal it should have been more favorable to him (*Reed* agt. *Moore*, ante, 264).
29. The respondent's right to costs in the county court must depend upon the fact, if his offer be not accepted, whether the judgment of that court be more favorable to the appellant than such offer; and if more favorable to the appellant than the respondent's offer, the section is imperative that the appellant will be entitled to costs; otherwise, he will be liable to the respondent for costs (*Id.*).
30. Consequently, the respondent is not confined in his offer to the claim of the appellant in the notice of appeal, even if that claim is *particular and specific as to the amount*; and this being so; it would be useless, and should, therefore, not be held necessary that the appellant's claim should be specific in amount (*Id.*).
31. The correct doctrine on this point is held in *Fox* agt. *Nellis* (25 *How.* 144), and *Loomis* agt. *Higbie* (29 *How.* 232), that it is not incumbent upon the appellant to point out in his notice of appeal, any specific error through which the judgment has been made too large or too small, nor to fix any amount to which it should be reduced; but that the general statement that "it is for too large a sum," or that "it should have been for a less amount of damages," is a sufficient particular to put the respondent to his offer. (See also to the same effect *Wynkoop* agt. *Halbut*, 43 *Barb.* 266.) (*MASON, J. dissenting.*) (*Id.*)
32. The legislature undoubtedly intended, in the language of the court in *Fox* agt. *Nellis*, to allow "each party to become an actor for the correction of errors, at his own peril of future expense, in case of further controversy" (*Id.*).
33. The finding of a jury on a question of fact, upon which there is conflicting evidence, is conclusive, and cannot, except in extreme cases, be reviewed on appeal (*Decker* agt. *Myers*, ante, 372).
34. On appeal from an order of the special term granting costs against executors, where the judge, on the motion, finds that the application to the executors was sufficient, and that they should have offered to refer, the general term will not review his finding of facts on that question (*Niblo* agt. *Binsse*, ante, 476).
35. Where a referee is appointed for the purpose of admeasuring and assigning dower, &c., the defendant waives every objection, except a want of jurisdiction, and even a right of appeal from the order of reference, by litigating before the referee without such appeal, and by filing exceptions to the report (*Brown* agt. *Brown*, ante, 481).
36. On appeal also, such an error in the proceeding as admeasuring dower by a referee, instead of the three freeholders, should be disregarded, as not affecting the substantial rights of the defendant (*Id.*).
37. A plaintiff is entitled as dower, to one-third of the land according to its value at the time of its alienation by the husband; and is not to be allowed for any increase in value since, or any improvements. But the improvements may be assigned as a part of the dower provided they are not taken into account in admeasuring the dower; although if an assignment be otherwise practicable they are not to be included (*Id.*).
38. Where a referee has exercised his discretion in assigning improvements as a part of the plaintiff's dower, which decision has been passed upon by a judge at special term, such decision should not be disturbed on appeal (*Id.*).

See NOTICE OF APPEAL.

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APPEARANCE.

1. The appearance of an attorney without authority, is a nullity (*Bean* agt. *Mather*, 1 *Daly*, 440).
1. Where one partner, without the knowledge or authority of his co-partners, indorsed the name of the firm upon a promissory note made for his individual benefit, and being sued upon the note, he without the knowledge or authority of the other partners, upon whom process had not been served, employed an attorney to appear not only for himself but for them, and judgment was rendered against all: *Held*, notwithstanding there was an appearance by attorney, that the judgment would be set aside, under such circumstances, against the other partners, and that they would be allowed to come in and defend (*Id*).

APPOINTMENT.

1. A person entitled under a power of appointment to dispose of property by deed or will, may make such disposition by a proper instrument, without inserting in it a reference to the power, if it otherwise appear that the intention was to execute the power. But where the disposition was by will, *held*, that a parol declaration by the testator, of an intention to execute the power, was not competent evidence of such intention. It is, however, competent for the court to compare the disposition of the will with the testator's own property, and to deduce therefrom an intention to embrace in his testamentary gifts the subject he was entitled by the power to dispose of (*White* agt. *Hicks*, 83 *N. Y. R.* 383).
2. The English cases decided since the American revolution, by which it was established that the amount of the testator's property could not be inquired into to show an intention to execute a power of appointment, are not to be followed in this state, especially as the rule has been disapproved of by English judges, and has recently been abrogated by act of parliament (*Id*).

ARBITRATION.

1. A banking association, organized under the general banking laws of this state, has the power by a resolution of its board of directors, voluntarily to dissolve itself and close its business, and to distribute a portion of its capital and surplus earnings

among the stockholders (*People*, ex rel. *the Genesee County Bank* agt. *Olmstead*, 45 *Barb.* 644).

2. And after such a resolution has been adopted, and a dividend upon the capital stock has been made and paid to the stockholders, and an equal amount of its stock surrendered and cancelled, it is erroneous for the assessors to assess the association on its entire capital as it existed prior to the dissolution and the making of the dividend. *DAVIS, J.*, dissented (*Id*).
3. If the assessors on application being made to them, refuse to reduce an assessment thus made, by deducting from the capital of the bank the amount of capital so distributed among the stockholders, a mandamus will lie (*Id*).
4. Where a valid contract has been entered into for the renewal of a lease, by which it is provided that the amount of rent to be paid shall be settled by arbitration, and either party refuses to appoint an arbitrator, a court of equity will compel a specific performance, and order a reference to ascertain what the amount of rent should be (*Kelso*, agt. *Kelly*, 1 *Daly*, 419).
5. The continuing in possession by the defendant after the expiration of the lease, was equivalent to an election to take the further lease; and by such election the covenant to appoint arbitrators, became binding upon both parties (*Id*).
6. On the refusal of the lessee, therefore, to appoint an arbitrator, as the lessor could not give a new lease until the amount of the rent should be fixed, the lessor is entitled to the equitable aid of the court to ascertain it (*Id*).
7. If the remedy which the party may have at law, will not put him in a situation as beneficial to him as if the agreement were specifically performed, relief should be afforded in equity (*Id*).

ARREST.

1. It is not a ground for setting aside an order of arrest, that the party had been arrested previously in the same suit, and on the same process, on a day of general election. The exemption from arrest expires with the day of election, and the parties afterwards stand towards each other as if no previous arrest had been made (*Petrie* agt. *Fitzgerald*, 1 *Daly*, 401).

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2. The exemption of a party or witness from arrest, is a personal privilege which can be waived; and the waiver is complete when the party or witness fails to claim it at once, and does some act in the cause in reference to his appearance (*Id.*).

3. A person arrested and detained upon an order from the war office at Washington, by authority of the President directing "Robert Martin to be transferred to General Hooker for trial," will be discharged on *habeas corpus*, where from the return, it appears that he is charged with the offense of arson in the night time in the city of New York, in November, 1864, and also being at that time within the Federal lines as a spy; he being at the time an officer in the Confederate army, but disguising his rank and character in the dress of a citizen (*In the matter of Robert Martin, ante*, 228).

4. By the restoration of peace, and the writ of *habeas corpus*, the military law and rule has become, as before the war, subordinate to the civil (*Id.*).

5. Arson is not a crime for which a prisoner can be tried by military court or commission, without a disregard of the provisions of the constitutions of both the state and the general government, securing a trial by jury (*Id.*).

6. There is no case where any person has ever been held or tried as a spy, who was not taken before he had returned from the territory held by his enemy, or who was not brought to trial and punishment during the existence of the war (*Id.*).

7. The prisoner, in this case, was not taken in the act of committing the offense charged against him of being a spy. He had returned within the lines of the Confederate forces, or had otherwise escaped, so that he was not arrested till after the Confederate armies had surrendered, been disbanded and sent to their homes, with the promise that they should not be further disturbed, if they remained there and engaged in peaceful pursuits (*Id.*).

8. A motion to discharge an order of arrest will be denied, where a material question of fact only, upon which the arrest is founded, is controverted by the affidavits of the respective parties. The court will not try such a question upon affidavits (*Butler agt. McReatine, ante*, 379).

See BAIL.

ASSESSMENT.

1. An assessment under a city ordinance, not made in conformity with the directions of the ordinance, is illegal and void; and a subsequent confirmation of it by the common council, will not cure the illegality (*Matter of Turley, 44 Barb. 46*).

2. An assessment is void which charges the owners of lots benefited, with a greater proportion of the expense than that directed by the ordinance (*Id.*).

3. Where an ordinance directs the assessors to assess an equal amount of the expense upon the city treasury, and upon the owners of the lots benefited, the direction can only be satisfied by charging one-half the amount to the treasury, and assessing the other half upon the owners, including the owners of the public parks (*Id.*).

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5. And after such a resolution has been adopted, and a dividend upon the capital stock has been made, and paid to the stockholders, and an equal amount of its stock surrendered and canceled, it is erroneous for the assessors to assess the association on its entire capital as it existed prior to the dissolution and the making of the dividend. DAVIS, J., dissented (*Id.*).

6. If the assessors, on application being made to them, refuse to reduce an assessment thus made, by deducting from the capital of the bank the amount of capital so distributed among the stockholders, a mandamus will lie (*Id.*).

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. A direction to the assignee in an assignment for the benefit of creditors, to pay first all the just and reasonable expenses, costs and charges, and commission of executing and carrying into effect the assignment, "and all reasonable and proper charges for attorney and counsel fees respecting the same"—does not render the assignment void (*Auf. agt. Peck, 1 Daly, 56*).

2. The assignment directed the assignee

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to pay all debts due or to grow due, referred to in schedule A. The schedule contains the names of two creditors, with words, "amount due him for services," annexed, but omitted to state the amounts due to them. *Held*, that the omission to specify the amount of the debts in the schedule, did not avoid the assignment. The words "debts to grow due," although objectionable, may be understood to mean claims which have not matured, but which are capable of being readily understood (*Id.*).

ASSOCIATION.

1. A voluntary association, created by a special act of the legislature, for the purpose of improving a stream, by increasing the supply of water for the supply of other works and improvements, as would increase the usefulness of said stream, for milling purposes; and it was evident from the articles of association that it was intended that the association should be a continuous and a permanent organization, and the only condition upon which any of the associates could withdraw from the association was that they had ceased to be owners and occupants of the property in reference to which they had become members; but the articles provided that upon a sale or disposition of his privilege and upon giving notice to the secretary, of that fact, any associate might be discharged from all further liability, and his successor could be substituted in his place, upon signing the articles, and become a member, subject to the same liabilities and entitled to the same privileges. *Held*, that sales of their property, by some of the associates, and their withdrawal from the association, did not effect a dissolution of the association: *Held*, also, that the association was not dissolved by the withdrawal of two of its members, upon their objecting to a purchase of land made by the association, and refusing to pay assessments, or to co-operate in its business and to participate in its proceedings, and that those members could withdraw only in the manner specified in the articles, and could relieve themselves from the contract they had entered into, only by a sale of their property (*The Troy Iron and Nail Factory v. The City of Troy*, 46 Barb. 533).

2. Where a statute authorized trusts of

real property to be created for the benefit of persons owning or occupying mill privileges on a certain creek or stream, the objects of such trusts being the improvement of said stream by increasing the head of water and regulating the flow thereof for the supply of mills, &c., on said stream, in the manner specified; and declared that the annual value or income of the property so to be held in trust should not exceed \$2,000. *Held*, that the terms "annual value or income," as used in the act, referred to the association itself, and not to its members individually, and did not mean the benefit which each member should derive from his mill privilege, or business, but a collective value or income received by the association, as such, under the statute. That the legislature did not intend to include in the annual value or income the increased value of the various manufacturing establishments upon the streams which derived an advantage from the improvements, or to estimate the market value of the privileges, and calculate the interest as the value or income, but that the design was to limit the annual value or income to the land obtained, the same as if it were used for any ordinary purpose (*Id.*).

3. *Held*, also, that the purchase of real estate was evidently contemplated by the trust created, and the purpose for which it was authorized; and that if land was necessary to aid the association in the improvement of the stream, the statute authorized its purchase, and was amply broad enough to cover and sustain such an acquisition. And that if the acquisition of a lake was important in carrying out the improvements intended, the fact that certain farming lands were included in the purchase thereof, did not vitiate the purchase, where it appeared that the association was obliged to buy the whole in order to obtain what was deemed absolutely indispensable. That if the purchase was made in good faith, and in the exercise of a judicious discretion, for the purpose of executing the objects of the association, it should be upheld and sanctioned (*Id.*).
4. An assessment made by a voluntary association upon its members, for improvements made upon its property in pursuance of an act of the legislature, for the purpose of increasing the head of water in a stream and regulating the flow thereof for the supply of mills, &c., is not unjust, oppressive and inequitable, because it provides

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that each associate shall be liable in proportion to the height of the fall, instead of the quantity of water used by him; where it appears that the associates have by the articles of association consented to be assessed, and the plan of assessment was adopted after due deliberation, and was fully approved. In the absence of any allegation or proof of fraud, mistake or surprise, a court of equity will not hold such an assessment to be illegal and inequitable and for that reason refuse to decree a specific performance of the agreement to pay assessments, contained in the articles of association (*Id.*).

5. In an action to collect assessments upon the members of an association, for improvements, a ruling of the judge, excluding the testimony of civil engineers tending to show that the purchases and expenditures for which the assessment was made did not proportionably advantage the defendants, and that the assessments made for them were unequal and unjust towards the defendants is not erroneous. Where it was agreed, in articles of association, that parties who might cease to be owners or occupants should, upon written notice of the fact to the secretary, be discharged from all further assessments, and that their successors should upon signing the articles, become members of the association: *Held*, that the effect of this provision was to impose on those associates who remained, after any withdrawal and any neglect of the successor to become a member, the burthen of contributing their due proportion as previously agreed upon, to sustain the expenses of the association; *Held*, also that it would not necessarily follow that a transfer of property by a member of the association, without a substitution of a successor, would destroy the plan upon which it was organized (*Id.*).

6. That if a portion of the associates voluntarily paid the assessments due upon property originally liable, under the articles of association, but not represented by an owner who was a member, such payment so far fulfilled and carried out the principle of assessment agreed upon as to preserve the organization; and that members sued for their assessments could not avail themselves of the objection that such voluntary payment was illegal and unauthorized (*Id.*).

7. Where, by articles of association, each of the associates severally bound himself to pay a ratable proportion of

all expenditures for the improvements made or to be made: *Held*, that the undertaking was mutual, the covenants of the associates being made with each other. And that the liability arose on the promise by each party to the other, which could only be enforced by an action among themselves. That those to whom the promise was made were the proper parties to bring the action. And that it was not essential that there should be a formal division of the interests of the associates into shares, where the proportions were agreed upon by the associates, in the articles, thus fixing the interest of each one, and the shares he represented (*Id.*).

8. In an action to collect an assessment made by a voluntary association upon its members, for improvements, the court cannot, by way of affirmative relief to the defendants, interfere with, or readjust the apportionment, or relieve them from the obligations which the award, and their own agreement, contained in the articles of association, have imposed upon them. Although members of an association have not enjoyed the full benefit of improvements made, and have refused to participate further in the transactions and business of the association, and have sought to abandon their connection with it, they cannot be permitted thus to exonerate themselves from responsibility (*Id.*).

ATTACHMENT.

1. The Code (§ 316), makes the *guardian of an infant plaintiff*, responsible for costs of the action, when they are adjudged against such infant, and provides that "payment thereof may be enforced by *attachment*." This means a process in the nature of a *ca. sa.* And it is not strictly necessary for the defendant to first issue his *execution* against the infant, in order to fasten the liability upon the guardian, and entitle the defendant to his attachment, though this is perhaps the better practice. Nor is there any necessity of an order of the court to first bring the guardian into *contempt*, before the attachment can issue (*Grantman* agt. *Thrall*, ante, 464).

2. The issuing of the attachment results simply from the adjudication against the infant plaintiff. The measure of liability, and the means of enforcement are prescribed by law, and the court cannot refuse to a party on a proper application, the process which the law in terms gives him (*Id.*).

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3. The word "may," in statutes, has always been held to be *imperative*, and equivalent to *must* or *shall*, whenever the public or third persons have a claim *de jure* that the power should be exercised (*Id.*).
4. It is clear that the poverty of the guardian is no defense to a motion for the attachment (*Id.*).
5. A *sheriff* has no standing in court to institute a *creditor's suit* to reach the *proceeds* of assigned property for the benefit of creditors, which he could not otherwise attach as the debtor's property (*Lawrence* agt. *The Bank of the Republic*, ante, 502).
6. Where an action was brought by the general *assignees* of judgment debtors, against a *bank* to recover a debt due them for money they had deposited to their credit as such assignees; and the bank set up as an off-set or counter-claim that it had obtained a judgment against the plaintiff's assignors in an *attachment suit*; that an execution had been issued thereon and returned unsatisfied, and that the bank had a right to apply the moneys deposited by the plaintiffs in their bank towards the payment of their judgment—the sheriff having previously attached the funds standing upon the books of the bank to the credit of the plaintiffs, in the attachment suit in favor of the bank: *Held*, that the bank was not entitled to retain the moneys to satisfy its judgment against the plaintiff's assignors (*Id.*).
7. The sheriff acquired no lien upon the funds by the service of the attachment. In *equity*, perhaps the bank might be adjudged to hold the proceeds of the assigned property in trust for creditors; but at law the bank is the debtor of the plaintiffs in respect to such funds (*Id.*).
8. When the assigned property has been sold by the assignees, and its *identity* gone, the *proceeds* cannot be attached or levied upon by the sheriff as the debtor's property; and setting aside the assignment simply, would not vest the title to such proceeds in the debtors (*Id.*).
9. A court of equity, in cases of *fraud*, follows the proceeds of the debtor's property, and afford a remedy by turning the legal owner of the funds into a *trustee* for the benefit of creditors. Such a suit lies against the judgment debtor and his assignees (*Id.*).
10. The defendants by their answer containing such *counter-claim*, and the service thereof, do not thereby take

the position of plaintiffs in a creditor's suit, and acquire a *lien* in the same manner as they would by the institution of a creditor's suit. Such a defense is in the nature of an *equitable set-off*; and cannot be sustained on the ground that it is a *complaint* in the nature of a creditor's suit (*Id.*).

11. Besides, in a creditor's suit against a judgment debtor, to set aside a prior assignment made by him in trust for the benefit of creditors, on the ground of fraud, the *judgment debtor* is a *necessary party* (*Id.*).

ATTORNEY AND CLIENT.

1. An attorney cannot serve, professionally, both parties to a controversy, and where he has been retained by one, he cannot recover for professional services rendered in the same matter to the other (*Herrick* agt. *Cutley*, 1 *Daly*, 512).

See APPEARANCE.

AWARD.

1. An award by a board of state auditors, obtained on an *ex parte* hearing, upon a fictitious and groundless claim, may be impeached for fraud and imposition on the part of the claimant. Money paid under such an award may be recovered back on establishing the fraud, but only to the extent that the state was damnified by the wrong (*State of Michigan* agt. *Phoenix Bank*, 33 *N. Y. R.* 9).

BAIL.

1. Where the plaintiff in an action gave notice that he would not accept the bail, and the bail never justified, and nothing was done by the defendant in relation to the undertaking: *Held*, that the plaintiff ceased to have any interest in it, and hence that he could not sue as the original obligee of the undertaking. *Per* OLIVER, J. (*Olapp* agt. *Schutt*, 44 *Barb.* 9.)
2. Where a defendant, on being arrested, gives bail by causing an undertaking to be executed, under section 187 of Code, by which the bail undertake and agree that the defendant "shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such process as may be issued to enforce the judgment" therein, the defendant is by force of such undertaking, in theory and legal effect, committed to the custody of his bail; and they are,

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by the terms of the instrument, to have his body always ready to be taken upon execution or other process; at all times "amenable to the process of the court in that action," till final judgment shall be rendered therein and be discharged and satisfied by payment, or by the surrender of his body to the sheriff in exoneration of the bail, or the taking of the same upon execution (*Appleby agt. Robinson*, 44 Barb. 316).

BAILMENT.

1. Where an agent deposits the property of his principal with another, without any limitation or qualification whatever, and without asserting any title to it or lien upon it, himself, the deposit enures to the benefit of the principal, and is in judgment of law made on his account (*Ball agt. Liney*, 44 Barb. 505).
2. G. as the agent of B. deposited with L. goods of his principal, for safe keeping, leaving with the depositary a memorandum of the articles, and written instructions to this effect: "The said goods not to be given up without the consent of the said G." Held, that assuming that the instructions were designed simply to protect G. in his individual capacity, as between G. and B., the former showing no lien or other authority to detain the goods against his principal, the depositary would have a right, and would be bound, to deliver them to B., the owner, on demand (*Id.*).
3. Where property is not put in a bailee's charge by the owner, but comes into his possession through the owner's neglect, and where he may not know to whom it belongs, or by whom it was left, he should not be held responsible for delivering it to the wrong person, if he has exercised all the care and vigilance that could reasonably be expected of him under the circumstances (*Morris agt. Third Ave. R. R. Co.* 1 Daly, 202).
4. If a bailee is made a party to a suit, and is required by judgment or order of the court to transfer the property in his possession to a receiver, that will protect him, as against his bailor; but if, on request, and without any order or judgment binding upon him, he voluntarily gives up the property to the receiver, he assumes the legality of the proceedings in the suit in which the receiver was appointed, and is bound to show their validity, for his protection (*Welles agt. Thornton*, 45 Barb. 390).

BANKS.

1. The owner of a bank bill accidentally tore it into two nearly equal parts, one of which, containing no words giving it a negotiable character, was lost. The bank, on demand being made upon it for the amount of the mutilated bill, refused payment until indemnified by the owner against the loss which would ensue to it from the refusal of the bank department to issue a new bill, or to re-transfer so much of its security pledged for the redemption of its circulation: Held, that the bank was liable for the amount of the note. 1. The embarrassment of the bank in enabling it to procure another bill, or re-transfer of an equal amount of its securities, does not furnish any defense to such an action. 2. This was not a case of *lost note*, and the provisions of 2 Revised Statutes, 406, §§ 75, 76, requiring a bond of indemnity to be given by a party seeking to recover on lost notes, &c., have no application. 3. This was clearly such a mutilated note as is contemplated by the act of 1840, chap. 363, § 5, which it would be the duty of the superintendent of the bank department to receive and deliver in lieu thereof to the bank another note of the same amount (*Martin agt. Blydenburgh*, 1 Daly, 314).
2. G., a member of a copartnership firm, made a check in the name of the firm, payable to H. or bearer, for the purpose of paying an account due from the firm to H., but instead of delivering and using the check for that purpose, G. retained it in his possession, and paid H.'s account by an account for a smaller amount which he held, individually, against H., and by payment of the balance in cash. He subsequently transferred the check to the plaintiff to pay a debt which he owed him: Held, that as the facts showed the check was drawn to pay a partnership debt in good faith, and it had passed into the plaintiff's hand for a valuable consideration, an action would lie, upon it, against the firm (*Gale agt. Miller*, 44 Barb. 420).

BANKING ASSOCIATIONS.

3. A banking association, organized under the general banking laws of this state, has the power, by a resolution of its board of directors, voluntarily to dissolve itself and close its business, and to distribute a portion of its capital and surplus earnings, among the stockholders (*The People ex rel. The Genesee County Bank agt. Olmsted*, 45 Barb. 644).

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BASTARDY.

1. Superintendents of the poor have no authority or power to discharge the putative father of a bastard child from the obligation he has entered into with the town, by giving a bond for the support of the child, without some compensation or equivalent which will effectually secure the support and maintenance of the child in the manner contemplated by the statute, or at least tend to assure such support (*The People* agt. *Mitchell*, 44 Barb. 245).
2. The common law never gave the putative father of a bastard child any right to its custody; and no provision of our statute secures to him any such right (*Id*).
3. A parol promise by the putative father, to take and support the child, upon the condition that the mother shall give up the child to him, being qualified by a condition which neither party has the right to make, or the power to fulfill, as against the mother, is not valid or binding, for that reason, if otherwise unobjectionable (*Id*).

BILLS AND NOTES.

1. One who indorses a forged check, warrants the genuineness of the check, and that of every prior indorser, but to the extent only of binding himself as indorser, and if the proper steps have not been taken to charge him as indorser, he is not liable to a subsequent holder who has given full value for the check (*Case* agt. *Bradburn*, 1 Daly, 256).
2. Where all that appears is that a creditor, after a note becomes due, takes from the maker a new note, a bill or check for the amount of it, payable at a future day, the conclusion must be that the parties have agreed to extend the time of credit upon the original note, until the supplementary instrument becomes payable; and if such an agreement is founded upon sufficient consideration, it is binding, and the indorsers of the original note are discharged from liability thereon (*Place* agt. *McIlvain*, 1 Daly, 266).
3. Interest on a promissory note, payable on demand, is allowed from the time of the demand, and not from the date of the note (*Bishop* agt. *Sniffen*, 1 Daly, 155).
4. That a demand of payment of a lost promissory note will be held sufficient, without an offer of a bond of indemnity, where it appears either that the note was not negotiable, or being negotiable, had not in fact been indorsed (*Id*).
5. A written agreement to pay money, provided the payee shall do a certain thing, is not negotiable paper, and is subject in the hands of a third person, to all defences valid against it in the hands of the original payee (*James* agt. *Hagar*, 1 Daly, 517).

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The possession of a promissory note by the plaintiff, indorsed in blank by the payee thereof, is *prima facie* proof of ownership, and sufficient, in the absence of other evidence, to entitle the holder to recover on proving the indorsement, &c. The allegation in the complaint that the holder acquired title thereto by gift from the payee, is unnecessary; and being alleged, need not be proved (*Bedell* agt. *Carl*, 33 N. Y. R. 581).
2. It seems, the promissory note of a third party is the subject matter of a gift *inter vivos*; and the delivery thereof into the immediate possession of the donee is sufficient to uphold such gift. The rule being, that all that is essential to uphold a gift of personal property by parol, is an expression to that effect by the donor, accompanied by a delivery of the thing to the donee (*Id*).
3. In determining the *lex loci contractus*, the engagements of the maker and indorser of a note are to be treated as independent contracts. The liability of the maker on a note executed in New York and payable in Illinois, is controlled by the law of Illinois, the state in which his engagement is to be performed. The duty of the indorser arises only on default by the maker, and by an unrestricted indorsement in New York to the holders, he undertakes to pay them in the state in which they reside (*Lee* agt. *Sellick*, 33 N. Y. R. 615).
4. An indorsement written in Illinois for the accommodation of a maker in Wisconsin, but intended to be delivered at New York for the purchase of goods, takes effect as a contract on delivery there, and the liability of the indorser is to be determined by the law of New York, and not by the statutes of Illinois. Under the Illinois statutes, the holders of a promissory note are not bound to pursue their remedy against the maker in the courts of another state, as a condition precedent to recovery against the indorser (*Id*).

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5. A point which is waived and not argued by counsel at the hearing of the appeal, ought to be examined by the court on their own motion, if any member deems it a material ground for granting a new trial (*Artisans' Bank* agt. *Backus*, ante, 242).

6. Where there is a conflict of testimony as to when and by whom the alteration of the date of a note, in suit was made, which alteration is palpable on its face, it is a proper question to be left to the jury to decide, although the action is against the indorser (*Id*).

7. A notice of protest without date, and not stating on what day the note was presented for payment, is not fatally defective for such omission. (*INGRAHAM*, *P. J. dissenting.*) (*Id*).

8. It is not a discharge of the indorser of a note to take a mortgage from the maker by the holder, as security, without the indorser's assent, if the time of payment is not extended (*Id*).

BILL OF PARTICULARS.

1. A party is not entitled to a bill of particulars upon demand in writing, under section 158 of the Code, where the claim of his adversary is for the violation of a special contract, and the consequential trouble and expense resulting therefrom (*Ives* agt. *Shaw*, ante, 54).

BOARD OF HEALTH.

1. The Commissioners of the Sinking Fund of the city of New York, have a sufficient interest in and to the revenues from the public markets in the city, to warrant them in bringing an action against the Board of Health of said city, to restrain them from interfering with said markets (*Mayor, &c., of New York* agt. *The Board of Health*, ante, 385).

2. The Board of Health have no power to remove, tear down, or in any way to interfere with the stands or stalls attached to a public market in the city of New York, on the ground that they are an obstruction upon the public street, or a nuisance (*Id*).

3. The act creating the Board of Health is to be construed as applicable only to such obstructions as are dangerous to life or health, and if not of that character, it does not apply (*Id*).

4. If unlawful obstructions are placed or erected in a public street, they become a nuisance; and when this is the

case it does not need the power of a board of health to remove it. Any citizen has a right, in a proper manner, to abate a nuisance; but it must be a nuisance which the law declares to be such, and not one merely declared so by any board or individual. It may well be doubted whether the legislature can delegate to any body of men the power to declare what is, or what is not a nuisance (*Id*).

5. It is not by any means certain that the extension of a public market in the city of New York, over the sidewalk, is such an obstruction of the public street, that may on account of its illegality, be declared a public nuisance (*Id*).

6. The rule that the party has a remedy by action in the recovery of damages against a party for exceeding its powers, and therefore an injunction should not issue, may be proper as to individuals, but is not applicable where both parties represent the public, and where the loss must fall upon the public whoever succeeds (*Id*).

See QUARANTINE, 1, 2.

CONSTABLES BOND.

1. A bond to a constable, conditioned to keep him harmless and indemnified of, from, and against all damages, costs, charges, trouble and expense that he may be put to, sustain or suffer by reason of a levy upon and sale of property on execution, is broken, and an action may be maintained upon it, as soon as a liability is incurred by the officer in consequence of such levy and sale (*Bancroft* agt. *Winspear*, 44 Barb. 209).

2. In an action brought upon such a bond the plaintiff may recover not only the amount he has actually expended in the defense of an action brought against him by one claiming to be the owner of the property levied on, but the costs and counsel fees of his attorney and counsel in defending such suit, although the latter have not been actually paid by the obligee (*Id*).

3. Where parties join in a bond of indemnity, as principal and sureties, they are in privity of contract with each other, and are to be regarded and treated, *quoad* the contract, and the rights and liabilities connected with and growing out of it, as one person. In such a case notice to one is notice to all (*Fay* agt. *Ames*, 44 Barb. 327).

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BUILDING CORPORATIONS.

1. A voluntary association had been engaged in improving and adding to a building already erected, used for a hotel and stores, and erecting a new one story building for a bar and reading room. The defendant, claiming to be a corporation formed under the provisions of the act of April 5, 1853, "to authorize the formation of corporations for the erection of buildings," succeeded to the ownership of the property, continued and completed several of the improvements previously commenced, and made other extensive repairs, alterations, &c., and purchased, held, managed and leased the property for the purposes of a hotel and stores: *Held*, that this was not a company formed for the erection of buildings, within the meaning of the statute (*The People* agt. *The Troy House Company*, 44 Barb. 625).
2. The leading object of the company, under the act of 1853, must be to carry on the business of erecting buildings for themselves or others, and not to confine themselves, as the primary and sole purpose of their organization, to the erection or improvement of a single building upon a single property of their own, for its more convenient and lucrative development and use (*Id*).

COMMON CARRIERS.

1. The plaintiff, having taken passage on defendant's steamboat, deposited his valise, containing wearing apparel, in a stateroom, the key of which was handed to him at the time of paying his passage. During his temporary absence from the stateroom, the door of which was locked, the valise was stolen: *Held*, that the defendants were liable. The liability of a common carrier is like that of an innkeeper, and it is no excuse for the latter to say that he delivered the guest the key of the chamber in which he lodged (*Mudgett* agt. *Bay State Steamboat Co.* 1 Daly, 151).
2. A voyage from one seaport to another, is not completed at the quarantine of the port of destination; and unless excused by special agreement, or by the health laws preventing intercourse with the city, the vessel is bound to carry a passenger and his baggage to the point agreed on (*Gilhooly* agt. *N. Y. and Savannah Steam Navigation Co.* 1 Daly, 197).
3. The delay of the owner to call for the baggage for several days after its ar-

rival at the point of its destination, does not release the carrier from his obligation to deliver it to him on demand. The demand must be made, however, within a reasonable time, and what is a reasonable time, is in all cases a question of fact, and the finding of the jury on that question will not be disturbed (*Id*).

4. The plaintiffs bought goods of E., and gave directions to ship them by the defendant, an express company: *Held*, that under such directions, E. had authority, so far at least as defendants were concerned, to make a contract limiting the defendants' liability (*Moriarty* agt. *Harnden's Express*, 1 Daly, 227).
5. A carrier receiving goods for carriage will not be required to examine the authority of the person presenting them, to make a contract limiting his responsibility. That the right of a common carrier to limit his liability, is no longer subject to discussion (*Id*).
6. The defendants, who are common carriers, running connecting lines of railway from Buffalo to Milwaukee, through their mutual agent in the city of New York, took from the plaintiffs the receipt of the Hudson River Railroad Company for certain goods marked "Janesville, Wis., via M. D. R. R.," and gave therefor a bill of lading, whereby it was agreed that the defendants would transport said goods over their lines to Milwaukee. At Buffalo, the goods instead of being delivered to or received by the defendants, were delivered on board a propeller, to be carried thence by lake to Milwaukee. The propeller and her cargo were lost on the passage: *Held*, in an action against the defendants to recover damages for the loss, that as the receipt of the Hudson Railroad for the goods was given to the mutual agent of the defendants, and as the holder of that receipt was entitled to the custody of the goods upon their arrival at Buffalo, it was incumbent upon the defendants to explain how it was that the goods were forwarded from Buffalo by a different route than theirs, and that it occurred under circumstances exonerating them from responsibility (*Le Sage* agt. *Great Western R. R. Co.* 1 Daly, 306).
7. To charge a common carrier there must either be a special acceptance of the property, or a delivery according to the established usage in the carrier's business; and where by the usage there is a person appointed to receive and take charge of a particu-

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- by the carrier to the Swifture line, at Albany, they were immediately forwarded to New York, and the barrels having been opened there, the apples were found to be injured by the frost, in consequence of the delay which had occurred: *Held*, that assuming that the plaintiffs' damages should have been assessed at the value or depreciation of the apples at Albany, proof of such value or depreciation in the New York market was proper, as furnishing a satisfactory basis upon which the jury could estimate the damages of the plaintiffs at Albany (*Id.*).
21. And that in the absence of any proof or allegation that there was any difference in the value between the two places, or that the property was injured or depreciated after it left Albany, it would be proper to instruct the jury that they might find the value of the apples to be their value as proved, at New York, deducting the freight from Albany to that city (*Id.*).
22. A carrier, in forwarding goods beyond the terminus of his own route, is bound by the instructions of the owner. It is his right and his duty, in an unforeseen emergency, when the safety of the goods requires it, and the consent of the owner may fairly be presumed, to deviate from the letter of his instructions and notify him of such deviation: but when the deviation is unnecessary, and for the mere convenience of the carrier, he assumes the risk of consequent injury, and remains responsible as an insurer. The primary duty of an agent is to observe the obstructions of his principal: and when he disregards them, he voluntarily assumes a responsibility by which he must be content to abide (*Johnson agt. N. Y. C. R. R. Co. 33 N. Y. R. 610*).
23. A delivery of a trunk of clothing to the captain of the defendant's boat, renders the defendants, as common carriers, liable for its loss, although the captain was not the general agent of the defendants for receiving freight, &c., for transportation. The captain was acting within the scope of the apparent authority of agent, which the principals allowed him to assume (*Witbeck agt. Schuyler, ante, 97*).
24. Railroad corporations, engaged in the transportation of property, are subject to the absolute responsibility, which by the common law, rests upon common carriers; they are, except as against loss or injury occasioned by the act of God, or of a public enemy, insurers of the safe transportation and delivery of the property intrusted to them for carriage (*Heineman agt. The Grand Trunk Railway Co. ante, 490*).
25. Common carriers cannot, by contract, shield themselves from liability for their own fraud, or their own willful act or negligence; but they may contract against liability for that low degree of negligence or want of care on their part which is not equivalent to willful or wanton neglect of duty or recklessness (*Id.*).
26. Common carriers may also by special contract relieve themselves from all responsibility for injury to or loss of the property intrusted to them for carriage, occasioned by the negligence, misconduct, fraud or felony of their employees or servants (*Id.*).
27. Where the plaintiff signed a special contract made by the defendants as common carriers, in which was a clause that "the owner of the within mentioned animals undertakes all risk of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise," and by which contract the defendants undertook to transport for the plaintiff from Stratford, in Canada West, to Buffalo, in this state, a car load of horses, and, as the plaintiff alleged, the defendants carelessly, negligently, wrongfully and willfully, run the car containing the horses on to a side track of its road, and kept them locked up for four days and nights without food or drink, and by its agents refused to permit them to be unloaded so that they could be fed—it being impossible to feed them in the car; by reason whereof the horses were nearly starved to death and thereby rendered comparatively valueless (*Id.*).
28. *Held*, that an action by the plaintiff against the defendants for damages by reason of such negligent, wrongful and willful acts, could not be sustained. The plaintiff was properly non-suited (*VERPLANCK, J. dissenting*) (*Id.*).
- See TELEGRAPH COMPANIES.
See RAILROAD COMPANIES.
- CAUSE OF ACTION.
1. The forms of the counts in a complaint, do not in all cases furnish the court the best evidence of the real nature of the plaintiff's claim. The facts out of which it originated must be ascertained, in order to compre-

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hend the real ground of the action (*Grocers' National Bank* agt. *Clark*, ante, 115).

2. Where the first cause of action mentioned in the plaintiff's complaint is, what would have been called (when it had a name) *trover*; and the second cause of action *case*, to recover damages for fraudulently certifying bank checks, by means whereof a large sum of money was fraudulently abstracted from the plaintiff: *Held*, that both causes of action are in *tort*, and not on *contract* (*Id*).
3. The plaintiff might have waived the fraudulent conversion, and sued the defendant for so much money had and received to its use; but not having done so, the discharge of the defendant does not apply to his imprisonment upon the plaintiff's claim. His discharge applies only to debts arising on *contract* (*Id*).
4. In action upon an *undertaking* given by the defendant to the plaintiff pursuant to sections 186 and 187 of the Code, to procure a discharge from arrest, the complaint is defective in showing a cause of action, where it omits to aver the fact substantially: 1st. That an execution against the *property* of the defendant has been issued to the sheriff of the county in which such defendant was originally arrested, and that the same has been returned by such sheriff unsatisfied in whole or in part. 2d. That an execution against the *body* of the defendant, having at least fifteen days between the *teste* and return thereof has been issued to the same sheriff, and by him returned that the defendant cannot be found within his county (*Gauntley* agt. *Wheeler*, ante, 137).
5. Since the form of an action of debt on the recognizance no longer exists, and the plaintiff is required to set forth in his complaint every fact which the plaintiff must prove to enable him to maintain his action, and which the defendant has a right to controvert in his answer, it seems necessarily to follow that the above statutory facts should be stated in the complaint. (*Id*).
6. When a balance is struck between *copartners*, and a promise to pay is given, an action of *assumpsit* may be maintained by the partner receiving the promise (*Koehler* agt. *Brown*, ante, 235).
7. Where a society was formed, the object of which was to form a common fund out of which to pay each member drafted into the United States armies, a fair and equitable share of said funds, or furnish a substitute; and providing that in case no draft takes place, all moneys, less expenses, will be returned to each member: *Held*, That the members of the society were *partners*. That the object of the creation of the society ceased when it appeared that no draft was to take place (*Id*).
8. The defendant, as treasurer, had the funds of the society in his hands, and promised to pay to the members holding certificates the balance due to them, determined upon by all the members in proper communion. An action for money had and received was therefore properly brought against him by the plaintiff for a balance due him as a member of the society (*Id*).
9. A cause of action in *trover* is *assignable*; and the assignee can sue in his own name (*Ward* agt. *Benson*, ante, 411).

CERTIORARI.

1. A certiorari to review proceedings under the title of the Revised Statutes, relating to the "relief and support of indigent persons," to seize the property of a person who has absconded, leaving his wife and children chargeable, or likely to become chargeable, to the public for support, can not be sued out by one who was not a party to, and has no interest in the subject matter of the proceedings (*The People, ex rel. Finch* agt. *The Overseers of the Poor of the town of Berne*, 44 Barb. 467).
2. A person not a party to summary proceedings under the statute, to recover the possession of land, who has been dispossessed by the sheriff, by virtue of a warrant issued by the judge, can sue out a certiorari to review the proceedings (*Starkweather* agt. *Seelye*, 45 Barb. 164).
3. The matters stated in the affidavit on which a writ of certiorari is allowed, are no part of the record, and cannot be noticed for the purpose of determining either the regularity or the validity of the proceedings before the county judge (*Id*).
4. The true test as to the right of review is, was the person seeking to review a party, in form or in substance, to the proceeding sought to be reviewed, so as to be concluded by the determination thereon? If not, although his rights may have been in-

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fringed by an improper execution of the process, he cannot bring up the matter for review (*Id.*).

COMPLAINT.

1. The forms of the counts, in a complaint, do not in all cases furnish the court the best evidence of the real nature of the plaintiff's claim. The facts out of which it originated must be ascertained in order to comprehend the real ground of the action (*Grocers' National Bank* agt. *Clark*, ante, 115).
2. In an action upon an undertaking, given by the defendant to the plaintiff, pursuant to sections 186 and 187 of the Code, to procure a discharge from arrest, the complaint is defective in showing a cause of action where it omits to aver the fact substantially (*Gaunley* agt. *Wheeler*, ante, 187).
3. 1st. That an execution against the property of the defendant has been issued to the sheriff of the county, in which such defendant was originally arrested, and that the same has been returned by such sheriff unsatisfied in whole or in part (*Id.*).
4. 2nd. That an execution against the body of the defendant, having at least fifteen days between the teste and return thereof, has been issued to the same sheriff; and by him returned that the defendant cannot be found within his county (*Id.*).
5. Since the form of an action of debt on the recognizance no longer exists, and the plaintiff is required to set forth in his complaint, every fact which the plaintiff must prove to enable him to maintain his action, and which the defendant has a right to controvert in his answer, it seems necessarily to follow that the above statutory facts should be stated in the complaint (*Id.*).
6. Where an infant sues by a guardian, as provided by the Code, the complaint must allege the due appointment of the guardian. Where a complaint was entitled "*J. G. by J. G. his guardian* agt. *G. T.*," and commenced thus: "The plaintiff complaining states," &c., but contained no allegation that the plaintiff was an infant, under the age of twenty-one years, or that the guardian was duly appointed: *Held*, bad on demurrer, for the reason that while it showed that the plaintiff appeared by guardian, it did not aver that the guardian was duly appointed, so as to authorize such appearance (*Grantman* agt. *Thrall*, 44 Barb. 173).

CONTEMPT.

1. To compel the attendance and examination of a party under section 391 of the Code, a summons must be served upon the party to be examined; and the notice in writing prescribed by that section, must be served upon the attorney of such party, before the party can be brought into contempt. It is not necessary that such notice should be served upon the party personally (*Van Rensselaer* agt. *Tubbs*, ante, 193).
2. Where a defendant in an action of divorce is imprisoned for the non-payment of alimony, he can be relieved from imprisonment only under the provisions of the Revised Statutes (2d vol. p. 598, § 20, in relation to proceedings for contempts in civil actions, &c.). (*Graley* agt. *Graley*, ante, 475).
3. In this case, the defendant on motion for a discharge, and for a reduction of alimony, was discharged on his paying the amount due for alimony for which he was committed. And on paying the amount accrued during his imprisonment, the order for alimony was reduced to \$10 per week (*Id.*).
4. Where an attachment was issued against a party as for a contempt, granted on an affidavit verified before a notary in a county other than that for which he was appointed: *Held*, that such attachment was issued without due proof by affidavit, as required by statute, and that the attachment order granted thereon, and all proceedings thereunder, should be vacated and set aside, as granted without authority. And this, notwithstanding sufficient may have appeared in the party's answers to the interrogatories subsequently filed, without resorting to the affidavits upon which the attachment was granted, the proceeding having been void from its inception (*People, ex rel. Larocque* agt. *Murphy*, 1 Daly, 463).
5. On a motion to commit a party for contempt, he should be permitted to read, in addition to his answers to the interrogatories propounded to him, affidavits showing the absence of any willful disobedience of the order for the violation of which it is sought to punish him (*Id.*).
6. Where a statute regulating the course of procedure for a criminal contempt, says that the court "may" receive affidavits, the exercise of a sound legal discretion requires that affidavits should not be excluded, unless they

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are manifestly irrelevant to the question (CARDOZO, J). (*Id.*).

7. The proper remedy for a party committed for a contempt under a void process, is to move the court upon affidavits disclosing the fact, for an order vacating it, and discharging the party. And where the judge who issued such process is no longer a member of the court, the motion may be made before any judge sitting at special term (*Id.*).

CONTRACT.

1. Where there is no note or memorandum in writing made of the contract of sale of personal property for over \$50, nor no part of the purchase money paid, the validity of the agreement must depend upon whether the buyer accepted or received any part of the property agreed to be sold (*Good agt. Curtiss, ante, 4*).
2. In order to constitute an acceptance or receiving of a part of the property within the meaning of the statute, it is necessary that there should be some *act*, something done indicating it beyond words merely. Accordingly, where the vendor and vendee, with the property before them, agree upon the terms of sale, and the price to be paid, and that the goods which is the subject of the contract shall become the property of the vendee, the title does not pass (*Id.*).
3. But it is not necessary that any part of the goods should be accepted or received by the buyer at the time of the contract; an acceptance or receiving of the same at any time afterwards, if it be done under the contract, and while that remains *unrevoked*, will be sufficient to comply with the requirements of the statute (*Id.*).
4. Where in an action upon an account against the defendants, they undertook to set off the value of some personal property which they claimed they had had sold to the plaintiff, and that he accepted a portion of it, which was in his possession, and ratified the agreement by its sale to a third person: *Held*, that this action having been commenced by the plaintiff some three weeks before he sold the property to such third person, was an unmistakable indication of the plaintiff's intention to disaffirm the contract, alleged by the defendants for the sale of the whole property previously, especially as the value of the property claimed by the defendants, largely exceeded
- the plaintiff's account. Besides, the positive testimony was sufficient to show that the alleged contract was discarded by the plaintiff, even though the sale of a portion of the property by the plaintiff, subsequently, might be considered a wrongful conversion of it by him (*Id.*).
5. Where the defendants, by a specification and drawings, dated the 4th of January, 1859, invited proposals for the construction of twenty-seven meerschaums, to be constructed thereunder of brick, deliverable at different times prior to the first day of July, 1859—specifying that eight (the remainder of the twenty-seven) were to be delivered on the first day of July, and containing a clause "*any number at our option*," also, "in addition to the above, we wish to estimate for the same number of iron meerschaums, to be delivered as above," giving a description of the latter; and the plaintiff proposed in writing, to construct twenty-six or twenty-seven of the brick meerschaums for \$1,650 each, or twenty-six or twenty-seven of the iron meerschaums for \$1,850, in accordance with the plans of January 4, 1859; "all the above to be in accordance as first plan and specifications, and to be delivered at such dates, and in such numbers, as the company may specify, in the next sixty-five days." Which offer was accepted in writing by the company. The plaintiff, after constructing seven meerschaums, was prohibited by the defendants from manufacturing any more, as they had failed to pay, and had become insolvent: *Held*, that the defendants, by expressing "any number at our option," would seem to reserve the right to *increase and not diminish* the whole number of meerschaums to be manufactured: *Held*, also, that the defendants having accepted and assented to the plaintiff's proposition, and the terms named, which varied their proposal, were liable for the whole number of meerschaums (27): *Held*, also, that the correct rule of damages was to allow the plaintiff the *actual profit* on each meerschaum (20) left unmanufactured (*Underhill agt. The North American Kerosene Gas Light Co. ante, 84*).
6. If a *written agreement* is signed by the party sought to be charged, and is certain, fair and just, in all its parts, it is not necessary that it should be signed by the party seeking to enforce it, in order to its specific performance. That is, the want of *mutuality* is no objection to its enforcement (*White agt. Schuyler, ante, 88*).

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7. A written agreement to re-convey, at a certain time, for a valuable consideration a certain number of shares of the capital stock of a "Steam Tow-beat Association," and to pay certain dividends received thereon, may be specifically performed, notwithstanding an objection that the contract relates to a class of property in regard to which it is not usual to direct a specific performance, on the ground that the party has an adequate remedy at law in damages. There may or may not be an adequate remedy at law, and besides the parties have specifically agreed to reconvey (*Id.*).
8. Where the time within which an agreement is to be performed, is purely a question of *fact*, which has been considered with care by the judge at special term, the court at general term will not usually disturb the decision made thereon (*Id.*).
9. An agreement in writing was entered into between the parties in this action as follows: "It is hereby agreed between J. W. Dimick and Hadden & Co., that the said J. W. Dimick shall, for the three years next ensuing, unless this agreement shall be dissolved by Hadden & Co. on three months' notice, consign exclusively to the said Hadden & Co., all the blankets of his manufacture, to be sold by them, and that the commission to be allowed Hadden & Co. for such sales, shall be seven and one half per cent, to cover the guarantee of debt and all charges (including insurance from fire) to which the goods may be subject after being received in store.
New York, June 12, 1861.
(Signed) J. W. DIMICK. [SEAL.]
(Signed) HADDEN & Co. [SEAL.]
Sealed and delivered in }
the presence of }
(Signed) WM. G. THOMPSON,
Witness.
10. *Held*, 1st. That this agreement having been duly acknowledged by one of the plaintiffs' firm and by the defendant to have been properly signed, and being attested by a subscribing witness at their request, was properly admissible in evidence (*Hadden* agt. *Dimick*, ante, 196).
11. *Held*, 2d. That the partner's authority to execute the sealed instrument was ratified by the subsequent acts of the plaintiffs under it, even if there was a failure of proof of authority existing at the execution of the paper (*Id.*).
12. *Held*, 3d. That the agreement was mutual, and that it was not in restraint of trade (*Id.*).
13. *Held*, 4th. That the agreement did not permit the defendant to sell blankets of his manufacture himself, without a breach of the agreement (*Id.*).
14. *Held*, 5th. That all preceeding and cotemporaneous agreements were merged in the writing; and it was, therefore, right to reject the evidence as to a previous parol agreement, in addition to the writing itself (*Id.*).
15. *Held*, 6th. That if the plaintiffs subsequently promised to be the defendant's sureties upon a contract to be obtained of the U. S. Government by the defendant, to sell his blankets to the Government, it was no defense to this action to recover the plaintiffs' commissions on the sales actually made by the defendant himself subsequently to the Government, by an agreement entered into by the defendant with the Government, with other sureties than the plaintiffs. They had a right to recede if they had promised. (*INGRAHAM, P. J. dissenting—holding that the plaintiffs' consent to defendant's selling to the Government might be inferred, or at least there was evidence enough to submit to the jury the question of their consent.*) (*Id.*)
16. Where a party desires to abandon or rescind a contract because of some alleged breach, the law requires him to act with due promptness in making his election, and he will not, as a general rule, be permitted to do so, when at the time of the decision both parties cannot be placed in the identical situation, nor can stand upon the same terms existing at the time the contract was made (*Hunt* agt. *Singer*, 1 *Daly*, 209).
17. The defendant agreed to take a loan which had been negotiated by the plaintiffs for one Schoonmaker, and to pay the expenses incurred by the plaintiffs in searching the title to the premises on which the loan was to be made, and also to pay for services rendered by the plaintiffs: *Held*, that the agreement was not void, as being collateral and without consideration (*Benedict* agt. *Dunning*, 1 *Daly*, 241).
18. A material alteration of a written contract by one of the parties to it, without the knowledge or consent of the other, not only discharges the latter from all liability upon it, but if fraudulently made will release him also from all liability upon the consideration upon which it was made (*Trow* agt. *Glen Cove Starch Co.* 1 *Daly*, 280).
19. Where the alteration was made under a mistaken sense of right, or by a stranger, without the knowledge of

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the party interested, the latter will not be precluded from recovering upon the original consideration. But, in such a case it is incumbent upon the interested party to absolve himself from all suspicion of any privity or knowledge of the fraudulent act (Id).

20. A clause in an agreement is to be construed most strictly against the party for whose benefit it is inserted. Hence, when an open policy contained a clause limiting the insurer's liability to the deficiency arising on the payment of any other policy of prior date: Held, that the limitation did not apply to goods in another policy, intermediate the date of the defendant's policy and their inscription thereon (Stuart agt. The Columbian Fire Ins. Co. 1 Dowl. 471).

See TELEGRAPH COMPANIES.

CONVERSION.

1. A cause of action in *trover* is assignable; and the assignee can sue in his own name (*Ward v. Benson*, ante, 411).
2. Where personal property wrongfully taken and sold by the defendant, the general assignee may maintain an action for conversion against the defendant, though the property was sold by the defendant in another attachment in favor of one of the owners, before assignment was executed by the owner (*Id.*).
3. The defendant was entitled to set up the amount for which the property was sold upon the attachment, as a defense to that amount. If the property was sold much below its actual value, the defendant, being the wrongdoer must suffer the loss of the depreciation (*Id.*).
4. The rule of damages in such a case, is ascertained by showing what the property was actually worth at the time of the taking and conversion, and deducting therefrom the amount for which it was sold on the attachment (*Id.*).
5. Where a creditor by a *bona fide* chattel mortgage, sells the property of the judgment debtor, upon the mortgage, and delivers possession to the purchaser, prior to the appointment of a receiver in supplementary proceedings of the debtor's property, such mortgage sale does not constitute a conversion of the property as against the

receiver, for which, as such, he can maintain an action (*Filmore* agt. *Horton*, ante, 424).

6. It is only when the party has possession or control of the property, that a refusal to deliver, on demand, constitutes evidence of a conversion (*Id.*).
7. Where property is given in exchange for notes, void in their inception for usury, the property so given in exchange may be recovered and the exchange rescinded, on the discovery of the nature of the notes; and an action will lie for the conversion of the property, notwithstanding the person giving the notes acted in good faith and without knowledge of their character (*Loeschig v. Bunn*, 1 *Daly*, 49).

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against the defendant for its conversion (Jaroslowski agt. Saunderson, 1 *Daly*, 292).

8. Actions to recover compensation for injuries done to personal property may be maintained wherever jurisdiction of the parties can be obtained. In such cases the venue is transitory (*Smith act. Butler, 1 Daly, 508*).

COSTS.

1. The Code (§ 816) makes the guardian of an infant, plaintiff, responsible for costs of the action, when they are adjudged against such infant, and provides that, "payment thereof may be enforced by attachment." This means a process in the nature of a *ca. sa.* And it is not strictly necessary for the

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- defendant to first issue his *execution* against the infant, in order to fasten the liability upon the guardian and entitle the defendant to his attachment, though this is perhaps the better practice. Nor is there any necessity of an order of the court to first bring the guardian into *contempt*, before the attachment can issue (*Grantman* agt. *Thrall*, ante, 464).
2. The issuing of the attachment results simply from the adjudication against the infant plaintiff. The measure of liability and the means of enforcement are prescribed by law, and the court cannot refuse to a party on a proper application the process which the law in terms gives him (*Id*).
 3. The word "may" in statutes has always been held to be *imperative*, and equivalent to *must* or *shall*, whenever the public or third persons have a claim *de jure* that the power should be exercised (*Id*).
 4. It is clear that the *poverty* of the guardian is no defense to a motion for the attachment (*Id*).
 5. In action brought by a *receiver*, in supplementary proceedings, and in pursuance of the order appointing him, to set aside a conveyance of real estate made by the judgment debtor, to a third person, and the defendant succeeds on the trial, the *judgment creditors* of the debtor, who are not parties to the action, and took no part in its prosecution, are not liable for the costs of the action (*Following the decision in the case of Wheeler* agt. *Wright*, 28 *How. Pr. R.* 228). (*Outler* agt. *Reilly*, ante, 472.)
 6. The law making parties in interest liable for costs, was not intended to apply to actions brought in the name of sheriffs, receivers, clerks or other officers of the court, although third parties might be interested in the recovery, unless the action was brought at the sole suggestion and urgency of such parties, and virtually conducted by them, and especially so, to a case where the action was brought by direction of the court (*Id*).
 7. On an appeal from an order of the special term *granting costs against executors*, where the judge, on the motion, finds that the application to the executors was sufficient, and that they should have *offered to refer*, the general term will not review his finding of facts on that question (*Niblo* agt. *Binsse*, ante, 476).
 8. An *extra allowance* of costs against executors depends on the same inquiry as the question of the recovery of costs against them (*Id*).
 9. Where, after the entry of judgment against executors, the judge at special term decides the question of costs and an *extra allowance* in favor of the plaintiff, it is proper to have the order entered *nunc pro tunc*, as of the day of entering the judgment (*Id*).
 10. Where, in an action to enforce a mechanic's lien against several defendants who appeared by the same attorney, the complaint was dismissed on motion, on the ground that it did not contain facts sufficient to constitute a cause of action, without any trial of the issues raised by the answers, and it did not appear that their defences were such as could not have been joined: *Held*, that separate bills of costs should not be allowed to these defendants (*Bailey* agt. *Johnson*, 1 *Daly*, 61).
 11. Where the complaint presents a *prima facie* case of jurisdiction, and the question is not raised by the issues, but the plaintiff, on the trial, admits the fact which shows the want of jurisdiction, his non-residence, and the complaint is dismissed on that ground: *Held*, such an adjudication of the action as will entitle the defendant to a judgment for costs (*Harriott* agt. *N. J. R. R. & T. Co.* 1 *Daly*, 37).
 12. The rule that costs will not be allowed on the dismissal of a complaint for want of jurisdiction, applies only in cases where the want of jurisdiction appears on the face of the summons or complaint, or the court is called upon to adjudicate the question on plea or demurrer (*Id*).

CREDITOR'S ACTION.

1. A *sheriff* has no standing in court to institute a *creditor's suit* to reach the proceeds of assigned property for the benefit of creditors, which he could not otherwise attach as the debtor's property (*Lawrence* agt. *The Bank of The Republic*, ante, 502).
2. Where an action was brought by the general assignees of judgment debtor's, against a bank to recover a debt due them for money they had deposited to their credit as such assignees; and the bank set up as an off-set or counter-claim that it had obtained a judgment against the plaintiffs' assignors in an *attachment suit*; that an execution had been issued thereon and returned unsatisfied, and that the bank had a right to apply the moneys de-

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posited by the plaintiffs in their bank towards the payment of their judgment—the sheriff having previously attached the funds standing upon the books of the bank to the credit of the plaintiffs, in the attachment suit in favor of the bank (*Id*):

3. *Held*, that the bank was not entitled to retain the moneys to satisfy its judgment against the plaintiff's assignors (*Id*).
4. The sheriff required no *lien* upon the funds by the service of the attachment. In *equity*, perhaps the bank might be adjudged to hold the proceeds of the assigned property in trust for creditors: but at law, the bank is the debtor of the plaintiffs in respect to such funds (*Id*).
5. When the assigned property has been sold by the assignees, and its *identity* gone, the *proceeds* cannot be attached or levied upon by the sheriff as the debtors property; and setting aside the assignment simply, would not vest the title to such proceeds in the debtors (*Id*).
6. A court of equity, in cases of *fraud*, follow the proceeds of the debtors property and afford a remedy by turning the legal owner of the funds into a *trustee* for the benefit of creditors. Such a suit lies against the judgment debtor and his assignees (*Id*).
7. The defendants by their answers containing such *counter-claim*, and the service thereof, do not thereby take the position of plaintiffs in a creditor's suit, and acquire a *lien* in the same manner as they would by the institution of a creditor's suit: Such a defense is in the nature of an *equitable set-off*; and cannot be sustained on the ground that it is a *complaint* in the nature of a creditor's suit (*Id*).
8. Besides, in a creditor's suit against a judgment debtor, to set aside a prior assignment made by him in trust for the benefit of creditors, on the ground of fraud, the *judgment debtor* is a *necessary party* (*Id*).

CRIMINAL LAW.

1. The act of 1859 authorizes the *court of general sessions* in the city and county of New York, to continue in session beyond the *third week* from its commencement, which was the original limit established by law (*Ferris* agt. *The People*, ante, 140, *Court of Appeals*).
2. *Sanity* is presumed to be the normal

state of the human mind, and it is never incumbent upon the prosecution to give *affirmative evidence* that such state exists in a particular case (*Id*).

3. Where an *irregularity* occurs in the drawing of a panel of jurors for a court of general sessions, which works no injury or prejudice to a defendant who is tried and convicted by such jury, a new trial will not be granted on the ground of such irregularity (*Id*).

CHATTEL MORTGAGE.

1. The time prescribed by the statute, for the filing of a copy of a chattel mortgage, in order to keep the security in force, relates to the first filing of the mortgage, and is limited to a period of thirty days previous to the expiration of the term of one year from such first filing. A filing before the commencement of the thirty days would be as nugatory as one after the expiration of that time (*Newell* agt. *Warner*, 44 *Barb.* 258).
2. Where a mortgage is sought to be kept on foot through a number of years, there must be successive filings annually, of the copies and statements, or the mortgage will cease to be valid, as against creditors and subsequent mortgagees and purchasers in good faith of the mortgagor (*Id*).
3. The statement of the interest of the mortgagee in the property claimed by him by virtue of the mortgage, which is required by the statute to be indorsed upon or accompany the copy of the mortgage filed, must be made by the mortgagee, in person or by attorney (*Id*).
4. A mere statement of the amount due to the mortgagee, made by the mortgagor or any third person, without any authority from the mortgagee, will not answer the requirement of the statute. The indorsing a certificate or acknowledgment of the amount due, upon a copy of the mortgage filed, by the mortgagor, is not the execution of a new mortgage for the debt, in any just or reasonable sense (*Id*).
5. An error of the register in improperly indorsing a chattel mortgage, whereby a subsequent purchaser is misled, does not invalidate the mortgage; the making of such indorsement is the duty of the register, and its omission is not the fault of the mortgagee, and cannot affect his rights (*Dikeman* agt. *Puckhafer*, 1 *Daly*, 489).

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6. *It seems*, that the remedy of a purchaser who has been misled as to the existence of a chattel mortgage, by reason of an omission or defect in the indorsement or filing of the mortgage, is against the officer making such error (*Id.*).

CHECK.

1. G., a member of a copartnership firm, made a check in the name of the firm, payable to H. or bearer, for the purpose of paying an account due from the firm to H., but instead of delivering and using the check for that purpose, G. retained it in his possession, and paid H.'s account by an account for a smaller amount which he held individually against H., and by payment of the balance in cash. He subsequently transferred the check to the plaintiff to pay a debt which he owed him: *Held*, that as the facts showed the check was drawn to pay a partnership debt in good faith, and it had passed into the plaintiff's hand for a valuable consideration, an action would lie upon it, against the firm (*Gale* agt. *Miller*, 44 *Barb.* 420).

CHARITABLE USES.

1. Where the whole scheme of a charitable trust in a will is founded upon the assumed validity of a devise therein of a certain farm in Virginia, such devise being void as against the laws of Virginia, no part of the charitable trust can be sustained (*Levy* agt. *Levy*, 83 *N. Y. R.* 97).
2. *It seems*, that to raise a trust at common law, there must be a definite grantee, devisee or donee, capable of coming into court and claiming the benefit of the grant, devise or bequest. (*Per* *WRIGHT, J.*) (*Id.*)
8. At common law, when the trust is for an uncertain object, the property which is the subject of the trust is deemed to be undisposed of, and goes to those to whom the law gives the ownership in default of disposition by the former owner. But the doctrine was held to be otherwise in respect to "charitable trusts." The question whether the doctrine of trusts for charitable uses in England, extended and strengthened by the prerogative of the crown, and the statute of 43 Elizabeth, are applicable in this state, discussed by *WRIGHT, J.* (*Id.*)

4. That peculiar system of English ju-

risprudence for supporting, regulating and enforcing public or charitable uses void by the rules of common law, not deemed to be in force in this state. (*Per* *WRIGHT, J.*) (*Id.*)

5. The cases of *Williams* agt. *Williams* (9 *N. Y.* 525), and *Owens* agt. *The Missionary Society of the Methodist Episcopal Church* (14 *N. Y.* 380), examined by *WRIGHT, J.* (*Id.*)

COMMISSIONERS OF HIGHWAYS.

1. Commissioners of highways are authorized to employ counsel in the preparation and trial of an indictment against an individual for obstructing a public highway, and to render other legal services in relation to matters connected with the control and management of highways. Such authority is incident to their official character. A contract of that nature, made by commissioners of highways with an attorney, may be enforced against their successors in office (*Duntz* agt. *Duntz*, 44 *Barb.* 459).
2. If a commissioner of highways advances the money out of his own pocket, to pay the claim of an attorney whom he and his associates have employed to render services for the town, in respect to highways, and takes an assignment of the claim to himself, individually, he may maintain an action thereon against his successor in the office of commissioner of highways (*Id.*).

COMPROMISE AND SETTLEMENT.

1. A settlement or compromise of a disputed or doubtful claim is a good consideration for a promise (*The Farmers' Bank of Amsterdam* agt. *Blair*, 44 *Barb.* 641).
2. If there be a controversy between persons, well based according to the belief and understanding of the parties—that is, a controversy real and substantial in character—a compromise entered into between them, and a settlement of the controversy, will be held valid and binding, and will be deemed a good consideration to support a promise, or to uphold an agreement by way of exoneration and discharge. In such a case it is not admissible to go behind the settlement, with a view to determine which of the parties was right (*Id.*).

CONSTITUTIONAL LAW.

1. The legislature had the power, not-

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withstanding the constitution of 1846 abolished the office of supreme court commissioner, to authorize county judges to do all the acts under such constitution that could be performed by supreme court commissioners, in letting to bail persons charged with crime prior to the adoption of that constitution (*The People* agt. *Hurlbutt*, 44 *Barb.* 126).

CORPORATIONS.

1. If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the state alone to take steps to dissolve such corporation, or forbid the exercise by it of corporate rights and franchises. The courts of equity do not take cognizance of such questions, in respect to corporations (*Doyle* agt. *The Peerless Petroleum Co.* 44 *Barb.* 289).
2. A director of a corporation, who sees a card issued by the officers of the company in the ordinary course of their business, with the names of the directors attached, cannot be held liable for false representations contained in the card, when it is found by the referee that he never circulated the cards and did not know the representations were untrue, and had no knowledge that they were true, but allowed his name to be used, without reflection as to the effect of doing so (*Wakeman* agt. *Dalley*, 44 *Barb.* 498).
3. The true construction of the section of the Revised Statutes which provides that "if any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease," is that the business there spoken of is such as the corporation may lawfully do under the act of incorporation; and if it has never done any business of that description, then the section applies (*The People* agt. *The Troy House Co.* 44 *Barb.* 825).
4. Under sections 10 and 14 of the act of 1853, the capital stock of the corporation must be paid in, within two years from the time of the incorporation; and it must be paid in money, or the corporation will be dissolved. It is not a compliance with these provisions of the statute for the stockholders to do something equivalent to the payment of money, by contributing

property of equal value with the amount of money required to make up the capital stock (*Id.*).

COUNTY COURT.

1. Proceedings instituted in the court of chancery prior to 1846, for the appointment of a committee of the person and estate of an habitual drunkard, and pending at the time the constitution of 1846 went into effect, by force of that constitution became vested in the supreme court, and not in the county court. Accordingly held that where, upon proceedings thus instituted, the county court, in the year 1852, made an order removing from his office the committee who had been appointed by the court of chancery, and appointing another person as such committee, and directing a sale of a portion of the drunkard's real estate by him, and all subsequent proceedings, including a deed from the new committee to the purchaser, were void (*Scribner* agt. *Qualtrough* 44 *Barb.* 481).

COUNTY JUDGE.

1. When the legislature enacted that county judges, when not holding court, may do whatever acts judges of the court of common pleas, being of the degree of counsellors of the supreme court and acting as supreme court commissioners, could do on the 12th of May, 1847, they conferred the power on county judges to let to bail persons charged with crime, whether indicted or not, in all cases where a justice of the supreme court can let to bail. And county judges, though not counsellors of the supreme court, may now do whatever acts supreme court commissioners might perform, prior to the constitution of 1846 (*The People* agt. *Hurlbutt*, 44 *Barb.* 126).
2. Hence they are authorized to let criminals to bail, though the latter are indicted for crimes not cognizable by the courts of sessions of their respective counties. And the certificate of acknowledgment of a county judge is entitled to be read in evidence, or recorded, in another county, without being authenticated by the clerk of the county of which the officer is judge; whether such judge is or is not of the degree of counsellor at law (*Id.*).
3. Where a person charged with crime is confined in a county jail, the county judge of another county is authorized to take the acknowledgment of the execution of a recognizance by the

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prisoner's sureties, within the latter county, in order that the recognizance may be sent to and acknowledged by the prisoner, and he be let to bail (*Id.*).

CASES COMMENTED ON.

1. The case of *Freeman* agt. *The Fulton Insurance Company* (14 Abb. Pr. R. 308), commented on, and declared to be not in conflict with *Grosvenor* agt. *The Atlantic Fire Insurance Co.* (17 N. Y. R. 391). (*Frink* agt. *The Hampden Insurance Company*, 45 Barb. 384).
2. The case of *Campbell* agt. *Adams* (38 Barb. 132), overruled (*Sands* agt. *Sweet*, 44 Barb. 108).
3. The case of *De Witt* agt. *Barly* (17 N. Y. R. 840), commented upon, and declared not to be in conflict with *Morehouse* agt. *Mathews* (2 N. Y. R. 514). (*Armstrong* agt. *Smith*, 44 Barb. 120).
4. The cases of *Martin* agt. *Knowllys* (8 T. R. 145), and *Baker* agt. *Wheeler* (8 Wend. 505), commented upon, and distinguished from the present (*Elwell* agt. *Burnside*, 44 Barb. 448).
5. The case of *Nellis* agt. *McCarn* (35 Barb. 115), so far as it relates to the point respecting the opinions of witnesses, overruled (*Armstrong* agt. *Smith*, 44 Barb. 120).
6. The decision in *Scott* agt. *Tyler* (14 Barb. 202), overruled (*Bancroft* agt. *Winpear*, 44 Barb. 209).

COMMISSIONER OF JURORS.

1. The commissioner of jurors in the city of New York, is not a judicial, but a ministerial officer (*The People ex rel. Livingston* agt. *Taylor*, 45 Barb. 129).

See MANDAMUS.

COMMISSIONS.

1. Where a factor, agent or broker, misconducts himself in the business of his agency, so that his services have not, by reason of his misconduct, negligence or fraud, been of any benefit to his principal, or have not proved as beneficial as they otherwise would, but for his misconduct, he forfeits his right to commission. But where a commission merchant in rendering accounts of his sales, returned certain sales as made at a lower rate than appeared on his books: *Held*, that although the principal might re-

cover the difference between the amount of the sales actually made and those returned, yet no fraud being proved, he could not recover the commissions already paid and allowed to the merchant for services actually performed in and about the business (*Boston Carpet Co.* agt. *Journey*, 1 Daly, 190).

CONSIGNOR AND CONSIGNEE.

1. The fact that the consignee's business address was stated in the bill of lading, does not oblige the shipper to depart from his known and usual place of delivery, and deliver the cargo at a pier more contiguous to the consignee's place of business (*Western Transportation Company* agt. *Hawley*, 1 Daly, 327).
2. Very slight evidence that a person assuming to act as the defendant's agent, was in fact his agent, should suffice to allow the question to go to the jury; as the defendant has it in his power, now that parties may be witnesses in their own case to show at once if the fact were otherwise, and that the acts of the agent were without his knowledge or authority (*Id.*).
2. The right of a shipper to revoke a consignment after the shipment has been made, and a bill of lading signed, by which the goods are deliverable to a consignee by name, but before the bill of lading is delivered to the consignee, cannot be questioned either on principle or authority. Until the bill of lading is parted with, no title to the property passes from the owner or shipper, nor does any right to the possession or ownership of the goods vest in the consignee (*Harderman* agt. *Book*, 1 Daly, 366).
4. The production of the bill of lading by plaintiffs, the possession of which they had never parted with, proves conclusively that they were the shippers and owners. The bill is regarded as a muniment of title to the property described in it (*Id.*).
5. Goods in public stores awaiting the completion of their entry at the custom house, by the payment of the duties, are to be deemed still *in transitu* (*Id.*).

COURT OF GENERAL SESSIONS.

1. The act of 1859 authorizes the court of general sessions in the city and county of New York to continue in session beyond the third week from its commencement, which was the

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original limit established by law (*Ferris* agt. *The People*, ante, 140, *Court of Appeals*).

2. *Sanity* is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecution to give affirmative evidence that such state exists in a particular case (*Id.*).
3. Where an irregularity occurs in the drawing of a panel of jurors for a court of general sessions, which works no injury or prejudice to a defendant who is tried and convicted by such jury, a new trial will not be granted on the ground of such irregularity (*Id.*).

DAMAGES.

1. The finding of a jury on a question of fact, upon which there is conflicting evidence, is conclusive, and cannot, except in extreme cases, be reviewed on appeal (*Decker* agt. *Myers*, ante, (372)).
2. A party cannot make his own declarations evidence in his own favor, where they are not called for by, or are not in response to anything said by the opposite party (*Id.*).
3. The admission of improper testimony upon a material issue is not a technical error, and cannot be disregarded, though there may be upon the same question other competent and sufficient evidence. The court cannot say that the jury were not influenced by the illegal testimony (*Id.*).
4. The legal rule or measure of damages for a breach of warranty of property sold, is the difference between the value of the property as it really was, and what its value would have been had it corresponded with the warranty (*Id.*).
5. The question to the witnesses, "what is the difference in value?" was improper and inadmissible. In this form it tended to elicit, and required or admitted the opinion of the witnesses upon the rule or measure of damages, and upon the amount of the damages the plaintiff was entitled to recover. A witness cannot thus be put directly in the place of the court and the jury (*Id.*).
6. The value of property may be proved by the opinion of witnesses who are well acquainted with the value of similar property; but its difference in value in one condition, and in another, cannot be so shown, being a conclu-

sion of the witness upon a mixed question of law and fact. He may give his opinion of the value of the property in one condition, and its value in another; but he should first state the facts within his knowledge upon which he founds his valuation, to enable the jury to appreciate his estimate, and the jury should be left to draw their own conclusion as to the difference of value (*Id.*).

7. *Nellis* agt. *McCarn* (35 Barb. 115), and *Harpending* agt. *Shoemaker* (37 Barb. 270), as to the admissibility of opinion on the question of damages, are in conflict with the long series of adjudged cases on the subject (*Id.*).
8. The objection to the inquiry in relation to the difference of value, was sufficiently specific to raise the question, whether the opinion of the witnesses was admissible, and it was not necessary to have repeated the objection to the similar inquiry of the witness Allen Miller, it having been interposed to the question to the next previous witness, and overruled by the justice (*Id.*).
9. The amount of damages recoverable in an action brought for a sum fixed by agreement as liquidated damages, may be reduced, by proving that a certain portion of the consideration expressed in the agreement has not been paid. For such portion the defendant has a cause of action arising out of the same transaction, and may set it off against the plaintiff's claim for damages (*Baker* agt. *Connell*, 1 Daly, 469).
10. Rule of, between assignee of property and creditors of the assignor, where they levied upon the property, &c., and the jury found for the assignee (*Robbins* agt. *Fitz*, 33 N. Y. Rep. 420).

DEATH BY WRONGFUL ACT, &C.

1. Our statutes of 1847 (*chap.* 450). and 1849 (*chap.* 256), by giving to the wife and next of kin of a person whose death shall have been caused by the wrongful act, neglect or default of another, a right of action to recover damages therefor, in effect, declare a right in the life of a person to exist in his wife and next of kin, and make the wrongful act, neglect or default by which his death shall be occasioned, tortious as to them (*Mahler* agt. *The Norwich and New York Transportation Co.* 45 Barb. 226).
2. Such act, neglect or default has no

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such character, in the absence of the statutes, and as acts complained of as tortious must be such at the place of commission, an action cannot be maintained by an administrator, under the statutes, if the death of the intestate, and the negligence causing it, occurred in the open sea, beyond the territorial limits of the state of New York; for there our statutes have no force or effect (*Id.*).

2. The father, as administrator of his infant son, deceased, may maintain an action for damages occasioned by causing the death of such infant by the wrongful act, neglect and default of the defendant. To entitle the plaintiff to recover under the statute, it is not indispensable that the deceased should leave him surviving, "a widow and next of kin" (*McMahon v. Mayor, &c. New York, 35 N. Y. M. 240*).

DEBTOR AND CREDITOR.

1. O. conveyed to V. his real estate by an absolute deed, and his personal property by a bill of sale. At the same time V. executed an agreement by which he covenanted with O. to take the property and pay certain debts of O. first, and other debts in proportion to the amount of funds realized from a sale of the property, and remaining after paying certain preferred debts. Nothing was paid by V. notwithstanding the acknowledgment of the receipt of the purchase price in the papers, but V. was a member of a partnership firm which was a creditor of O. and the debt was to be among the first paid. After the application of the proceeds of the sales to the payment of all the debts of O. the balance, if any, was to be returned or paid over to him: *Held*, that the deed, bill of sale, and agreement must be read and construed together, as if the whole were contained in one instrument; and that read and construed in that manner, they constituted an assignment in trust for the benefit of creditors, and must be so regarded in law, notwithstanding the form of words used in the several instruments (*Van Fleet v. Stinson, 45 Barb. 317*).

2. Section two of the act of 1880, respecting assignments for the benefit of creditors, requiring an assignor, within twenty days after the date of an assignment, to make and deliver to the county judge an inventory of his debts and assets, and section three, requiring the assignee, within thirty

days after the date of the assignment, to give a bond, conditioned for the faithful discharge of his duties, are directory merely; and an assignment, in other respects good, is valid, and vests a perfect title in the assignee, although not followed by the schedule or bond provided for by the statute (*Id.*).

3. V. has in his hands, of another, with no judgment creditors, he has acquired in or by, or in violation of, a court of equity the judgment creditor's trust which is such a state of *ft. Greene, 45 Barb. 320*).

4. Where a creditor claims a larger sum to be due to him than the debtor admits, but regards the matter as open for negotiation, and after some discussion, he finally yields to the debtor's claim, and agrees to accept a lesser sum, and takes a promissory note from the debtor, for that amount, he will be bound by the settlement, especially in a case where he does not ask for a reformation of the instrument on the ground of mistake, and for a correction of the error in the settlement (*Powell v. Jones, 44 Barb. 321*).

5. Where three assignments of property and accounts were executed at different dates, by debtors, to a creditor, to secure the payment of separate debts incurred at different times, it was *held*, that they were not to be construed as one transaction, and as amounting to a general assignment for the benefit of creditors, and as such void because they did not provide for paying all the debts of the assignors (*Wyndkoop v. Shadruck, 44 Barb. 324*).

6. A commission of twenty per cent for the collection of assigned accounts, consisting of small bills of account, which caused much trouble and loss of time in their collection is not unreasonable (*Id.*).

7. Where an assignment made by an insolvent debtor, in trust for the benefit of creditors, contains provisions which are calculated, *per se*, to hinder, delay or defraud creditors, the fraud must be passed upon as a question of fact. But if the necessary consequences of a concealed transaction in the defrauding of another, the transaction itself is conclusive evidence of a fraudulent

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intent, inasmuch as a party must be presumed to have intended the necessary consequences of his own act. And if in such case, against such evidence, a jury or referee should find that there was no fraud, it would become the duty of the court to set aside the finding (*Kavanagh* agt. *Beckwith*, 44 Barb. 192).

8. And where an assignment on its face shows that it must necessarily have the effect of defrauding the creditors of the assignor, it is conclusive evidence of a fraudulent intent, and is void, and the same rule should prevail in cases where *extrinsic* facts and circumstances, admitted by the parties, or established by the evidence without dispute or explanation, make the assignment necessarily fraudulent according to the law of the case (*Id*).
9. An over statement of the amounts of certain preferred debts will not render an assignment necessarily fraudulent. The assignees are not bound to pay the debts at the amounts therein specified. They are bound to pay the debts at their just amounts, and nothing more. They may require proof as to the amounts, and it is their duty to do so, if they have reason to believe the amounts are not correctly stated, in the assignment (*Id*).

DECLARATIONS.

1. The plaintiff having made a proposition to the defendant, to do certain work and labor upon a building which the latter was erecting, the defendant told him to go and see B. the contractor, about it. He did so, and B. employed him to do the work. There being some evidence to show B.'s agency for the defendant: *Held*, that proof of declarations made by B. in making the contract with the plaintiff was admissible evidence against the defendant, the declarations being those of an agent, relating to the subject matter of his agency (*Piemug* agt. *Smith*, 44 Barb. 554).

DEED.

1. Where a grantor, at the time of executing a conveyance of land, has no legal title to the land, but has merely an equitable title or interest therein, and he afterwards acquires the legal title, he takes and holds such title in equity, in trust for such prior grantees (*Doyle* agt. *The Peerless Petroleum Company*, 44 Barb. 239).
2. If he conveys the legal title to other grantees, without the authority and

consent of those to whom he has previously conveyed the land, so far as the interests of the latter are concerned, the subsequent grantees, taking their conveyance with knowledge of the trust and of the equities of the parties interested in the premises, will be deemed substituted in the place of the grantor as the trustees of the title for the prior grantees, and will be compelled to execute the trust by conveying to them, respectively, their proportionate interests in the land. But if the subsequent conveyance is executed under the authority, and at the request of the prior grantees, the subsequent grantees will receive it free from all trusts attaching to the land, arising from the acts of the grantor (*Id*).

3. A delivery always implies an acceptance by the person to whom the delivery is made; and although where a deed or mortgage, or an instrument purporting to be such, is properly acknowledged and recorded, the presumption is that it has been duly delivered to the grantee or mortgagee, and that it is, in legal effect, what by the record it purports to be; yet such presumption is only *prima facie*, and may be rebutted by parol or other evidence, and shown to have never been delivered, or for any other reason to possess no legal existence or validity (*Wilsey* agt. *Dennis*, 44 Barb. 354).

4. Where a statute authorized trusts of property to be created for the benefit of persons owning or occupying mill privileges on a particular stream, and declared that the legal title and estate of any property so held in trust should be vested in the trustees, "to be named in the conveyances or declarations of trust," and in those who should, from time to time, be substituted or designated as trustees, in the manner to be provided in such conveyance: *Held*, that a deed of land which the association represented by the trustees had purchased and paid for, and of which it was in possession, to "the trustees" of the association, and their successors in office, without naming any such persons as trustees, was not absolutely void in a case where the controversy did not arise directly with an individual contesting the title of the grantees; although it did not name the trustees, and although there was no provision in the deed, or in any declaration of trust as to the manner in which persons should be, from time to time, substituted or designated as trustees (*The Troy Iron and Nail Factory* agt. *Corning*, 45 Barb. 231).

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5. *Held*, also, that the deed must be considered and interpreted in connection with the statute, and the articles of association showing the character of the trust intended, and appointing trustees to carry out the purposes and objects designed to be effected (*Id*).

DEFENSE.

1. The 149th section of the Code requires the defendant to deny in his answer only such allegations in the complaint as he intends to controvert (*Newell* agt. *Doty*, 33 N. Y. R. 83).
2. A defendant cannot defeat a recovery by setting up an outstanding right in a third party, who acquiesces in the title of the plaintiff. A conveyance under a decree of foreclosure, of premises not embraced in the sale, does not pass the title, though the premises were embraced in the decree. A manifest mistake in a decree, by words of misdescription, when the premises are otherwise sufficiently identified and described on the face of a decree, does not prejudice the rights of the parties, the words of misdescription being mere surplusage (*Laverty* agt. *Moore*, 33 N. Y. R. 658).

DEVISE.

1. It seems that a devise of real estate universal in its terms, would carry after-acquired lands, without any language pointing to the period of the testator's death. But in the absence of unlimited terms in the will, there must be language which will enable the court to see that the testator intended to operate upon real estate which he should afterwards purchase (*Lyons* agt. *Townsend*, 33 N. Y. R. 558).
2. A declaration in the will that he "appoints his executors for the full and final settlement of his estate, whether real or personal"—where he possessed real estate at the time of making the will—is not to be deemed a sufficient indication of his intention that the will should operate upon real estate subsequently acquired (*Id*).

DISCOVERY (TITLE).

1. Individuals cannot obtain the right to the exclusive possession of islands in the sea, by virtue of discovery, irrespective of the act of congress, passed in August, 1856 (*The American Guano Co.* agt. *The United States Guano Co.* 44 Barb. 23).

2. Islands newly discovered by its citizens, belong to the United States; and until some exclusive rights are obtained, in pursuance of the provisions of that statute, all the citizens of the United States possess equal rights to go there. But where the plaintiffs, while an island, remained in an unoccupied condition, by their agents went upon it, and expended money in erecting works and making improvements, and mining guano, which they conveyed to the shore: *Held*, that they were entitled to be protected in the enjoyment of such property, and in possession of the guano so mined (*Id*).

3. One who acting upon information obtained from another of the existence of a guano island discovered by the latter, takes the first actual possession thereof, cannot claim an exclusive title as discoverer, under the act of congress of August, 1856, even as against third persons (*Id*).

DISCOVERY OF BOOKS AND PAPERS.

1. An application for discovery of books and papers, must specially state what information is wanted, and that the books or papers referred to, contain such entries. And this must be stated upon positive affirmation, and not on mere information and belief. It is not enough to dispense with this positive oath, that the party is absent (*Walker* agt. *The Granite Bank*, 44 Barb. 39).
2. An order directing not only the deposit of certain specified books for the period of five years, but also "all other books of the defendants which contain any accounts or entries showing," &c., is extending the right of a party to examine his adversary's books much beyond what was contemplated by the law, or what has been sanctioned by the courts (*Id*).
3. In an action to recover damages for an alleged libel, published in a newspaper, the plaintiff is not entitled, under the provisions of the Revised Statutes, or the rules of court, to a discovery of the books and papers of the defendants, for the purpose of enabling him to prepare his complaint, and to insert therein the names of real defendants in place of certain fictitious names contained in the summons (*Opdyke* agt. *Marble*, 44 Barb. 64).
4. Where there is nothing in the moving papers showing what entry exists in

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the books, &c., of which a discovery is sought that would disclose the names of those whom the plaintiff might desire to join as parties defendants; but the plaintiff merely swears that he is informed and believes that the books, &c., will show, &c., this will not be deemed sufficient. Parties are not allowed to fish for evidence in the private books of account of others who are parties to an action upon a simple guess that there may be some entry that will help their case (*Id.*).

5. Where it appears upon the moving papers, that the books, &c., of which a discovery is sought, belong to a corporation, and not to the parties who are defendants in the action, the latter having no control over them except as agents of the corporation, a discovery will not be granted, although the plaintiff alleges that the corporation is a sham (*Id.*).

DISTRESS.

1. The right to distrain for wharfage, was not taken away by the act of 1846, abolishing distress for rent, nor by the act of 1860, "in relation to the rates of wharfage," &c. The reference in the latter act, to section 207 of the act of April 9th, 1813, is clearly a mistake, and the statute being a remedial one, will be construed as a reference to section 217 of the same act (*Mangum* agt. *Farrington*, 1 *Daly*, 236).

DISTRICT COURTS.

1. The statute is imperative, that when it appears upon the trial in a district court, that the plaintiff is not a resident, and has filed no security, the complaint must be dismissed. And it does not alter the rule that the fact of non-residence and failure to file security, appear for the first time upon a new trial, ordered by the appellate court (*Dean* agt. *Cannon*, 1 *Daly*, 34).
2. An order for a new trial imposes no duty on the court below, inconsistent with, or restrictive of, any of its powers. The case is to be heard and decided, on a new trial, in the same manner as if the trial were an original one (*Id.*).
3. The appeal from the district court of the city of New York is to the general term of the court of common pleas, in that city, and the provision of the act of 1862, authorizing a re-

trial of cases tried in a justice's court in a county court, does not apply to the city of New York (*Molteny agt. Wasson*, 1 *Daly*, 285).

6. Where the justice of a district court renders judgment for the plaintiff on conflicting evidence, the appellate court will assume in respect to every point on which the testimony was conflicting, that the justice found in favor of the plaintiffs (*Dayton* agt. *Rowland*, 1 *Daly*, 446).

DOMICIL.

1. A married man having his family fixed in one place, but doing business at another, is deemed to have his residence at the former, and while his family so remain fixed, he cannot acquire a residence elsewhere (*Roberti* agt. *Methodist Book Concern*, 1 *Daly*, 13).
2. Although by reason of a prolonged absence from the state, a party might be proceeded against by attachment, at the instance of a creditor, yet he may be deemed a resident of this state for all other purposes. Thus, where a plaintiff had been absent from the state for more than two years, on business, but his wife and minor child continued to reside here: *Held*, that the plaintiff was not such a non-resident as that the court would compel him to file security for costs (*Id.*).

DOWER.

1. The courts of this state have no jurisdiction over lands in this state purchased by the United States with the consent of and ceded by the state, for the erection of post-offices, custom houses, court rooms, forts, magazines, arsenals, dock yards and other needful buildings (*Dibble* agt. *Clapp*, ante, 420).
2. Congress is vested with the same exclusive jurisdiction over such places as it possesses over the District of Columbia, and the same results follow. Consequently the inhabitants of such places, actually dwelling therein, are not entitled to the exercise of the elective franchise at state elections, nor to the other political privileges exclusively belonging to the citizens of the state (*Id.*).
3. Nor have the courts of this state jurisdiction of an action of *ejectment* to recover dower in such lands, where the land was purchased by the United States from the husband of the claim-

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- ant, and ceded by the state, while he was living, and the right of dower of the wife was *inchoate* (*Id.*).
4. *It seems*, that the act of the legislature of this state, giving the consent and ceding the lands to the United States, after such purchase, vested the fee of the *whole premises* in the United States, free from any claim of dower (*Id.*).
 5. An *equitable action for the admeasurement of dower*, is sustainable under the Code. Courts of equity have always had jurisdiction, concurrently with courts of law in such actions (*Brown* agt. *Brown*, ante, 481).
 6. If it be also an action of *ejectment* for the recovery of dower, there is no difficulty in the junction of the two. Courts of equity have always administered other equities in conjunction with such admeasurement (*Id.*).
 7. But all the boundaries of jurisdiction and distinction, between causes of action as legal or equitable being removed, there seems no reason, why all the relief to which the plaintiff is entitled should not be given in *one action* (*Id.*).
 8. In an action to recover dower, where the court adjudge that the plaintiff is entitled to dower, it may appoint a *referee to admeasure the plaintiff's dower, and assess her damages by loss of rents and profits*, instead of the *three freeholders* formerly required in an action of *ejectment for dower*. (2 *R. S.* 312, § 48, sub. 1; *Id.* p. 310, §§ 36 to 47;) or a *special petition* (*Id.* 489, § 10). (*Id.*)
 9. Where a *referee* is appointed for the purpose of admeasuring and assigning dower, &c., the defendant waives every objection, except a want of jurisdiction, and even a *right of appeal* from the order of reference, by litigating before the referee without such appeal, and by filing exceptions to the report (*Id.*).
 10. On *appeal* also, such an error in the proceeding as admeasuring dower by a *referee*, instead of the *three freeholders*, should be disregarded, as not affecting the substantial rights of the defendant (*Id.*).
 11. A plaintiff is entitled as dower, to *one-third* of the land according to its *value at the time of its alienation* by the husband; and is not to be allowed for any increase in value since, or any *improvements*. But the improvements may be assigned as a part of the dower provided they are not taken into account in *admeasuring* the dower; although if an assignment be otherwise practicable they are not to be included (*Id.*).
 12. Where a referee has exercised his discretion in assigning *improvements* as a part of the plaintiff's dower, which decision has been passed upon by a judge at special term, such decision should not be disturbed on *appeal* (*Id.*).
 13. In this case the *taxes* before the six years to which the inquiry of valuation of premises, &c., was limited, were properly excluded by the referee, as was also the rate paid for the use of *Croton water* by the defendant. Also any amount paid for *ornamental work or repairs to the additions or improvements* was properly excluded (*Id.*).
 14. A widow, after her quarantine of thirty days has expired, has no right to the possession of premises of which her husband died seized, and no right to enter thereon for her dower before it has been assigned to her (*Corey* agt. *The People*, 45 Barb. 362).
 15. B. & B. having a contract from W. and others, for the purchase of a lot of land upon which they had paid a part of the purchase money, agreed by a contract in writing, dated September 27, 1828, to sell and convey said lot to M. by deed, on or before the 1st of January then next. M. was to pay \$610 at the time of the execution of the deed, and give a bond conditioned to pay B. & B. \$1,365 in seven annual payments from the said 1st of January, with a mortgage to them on the land, as security for the bond. It was arranged that W. and others should convey directly to M., they receiving from M. whatever was due to them from B. & B. The deed was made out and dated December 29, 1828, was acknowledged by the agent of C. & U. two of the grantors, on the same day, and by W. the other grantor, December 31. It was put on record in the proper clerk's office January 2, 1829, at 9 o'clock A. M. The mortgage, dated January 2, was acknowledged the same day and put on record at 10 o'clock of the same day: *Held*, that the giving of the deed and taking of the mortgage were one transaction; and that the two conveyances were to be considered as executed at the same time, within the spirit and intent of the statute relative to dower in lands mortgaged for the purchase money. And that consequently the widow of M. was not entitled to dower in the premises: *Held*, also, that the mortgage having been given for a part of

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the purchase money of the premises, the fact that the deed was executed by W. and others, and not by B. & B. the mortgagees, did not affect that question (*McGowan* agt. *Smith*, 44 Barb. 232).

16. A widow's estate in dower is favored in the law, and proceedings having in view its enforcement or establishment should be encouraged, rather than defeated (*Matter of Sippert*, 44 Barb. 370).

17. She may therefore apply by petition for the appointment of commissioners to admeasure her dower, notwithstanding a partition suit has been commenced, for the partition of the premises in which dower is claimed, to which suit she is a party (*Id.*).

18. The fact that a partition suit has been already commenced, and by it the court has obtained jurisdiction of the widow's rights and interests in the premises, is no reason for preventing her from acquiring a better and superior title. If, in the race of diligence, she can procure the admeasurement of her dower before the partition proceedings are ripe for a decree of sale, she is legally entitled to the fruits of such diligence (*Id.*).

EQUITABLE CONVERSION.

1. It is a rule in equity, arising from the doctrine of equitable conversion, that when land is taken for public use for canals, railroads, streets or otherwise, the money awarded for such land remains, and is to be considered as land, in respect to all rights and interests relating thereto (*Bank of Auburn* agt. *Roberts*, 45 Barb. 407).

2. The money in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or incumbrancers in respect to such land (*Id.*).

EQUITY.

1. Where a plaintiff fails in obtaining the relief sought for in equity, the court is not bound to dismiss the complaint, if in case of a dismissal, the plaintiff would be remediless, because the statute of limitations would be a bar to a new action; but it may, if it deems the case a proper one for trial by jury, order it to be tried at the circuit by a jury (*Genet* agt. *Howland*, 45 Barb. 560).

2. Thus, where the court determines that the plaintiff had no good ground on which to commence an action for the redemption of a pledge, and nothing remains but an action for the tort in improperly disposing of the pledge, for which an ample remedy exists at law, it may order the cause to be tried by a jury at the circuit (*Id.*).

3. It is not the province of courts of equity to relieve parties failing to perform their contracts, from the legal consequences of such failure, unless it has resulted from mistake, fraud or accident, or the acts and dealings of the parties show an assent to the delay by the party insisting upon the forfeiture, and it appears that under the circumstances it would be inequitable for him to insist upon it (*Tibbs* agt. *Morris*, 44 Barb. 138).

ESTOPPEL.

1. A party is not concluded by everything he may have said or done, even under oath. The doctrine of estoppel is confined within just and rational limits, and a party is not estopped unless he has gained some benefit or advantage by the act which is relied upon as an estoppel, or unless by that act the party claiming the benefit of the estoppel was induced to alter his condition. Thus, where the plaintiff filed notice of an ineffectual mechanic's lien, wherein he swore that the contract was made with the contractor: *Held*, that in an action against the owner, the plaintiff was not estopped from showing that such contract was in reality made with the defendant, as owner (*Smith* agt. *Ferris*, 1 Daly, 18).

2. Where a boundary line is fixed and settled by parol agreement between A. and B., adjoining owners, and B. afterwards, with the knowledge of A. makes valuable and expensive improvements, relying upon such settlement, without any objection or remonstrance, or notice of dissent from A. in regard to the line thus established, the latter is estopped from claiming that such was not the true boundary line between their respective lots. If under such circumstances, A. does not intend to be bound by the survey, and the line made and marked in his presence by the surveyor called with his assent, for that purpose, it is his duty to notify B., when he sees him erecting his wall, and making an addition to his house in accordance

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with the line thus made (*Corkhill* agt. *Landers*, 44 Barb. 218).

3. The rule applies equally to transactions in regard to real and personal property. It does not at all touch the question of creating title to real estate by parol. The principle is, that he who is silent when conscience requires him to speak, shall be debarred from speaking, when conscience requires him to be silent. A defense of this kind may be set up in the action of ejectment (*Id*).
4. An estoppel will not arise from the fact that the holder of a mortgage, though present at a sale of the mortgaged premises, made by order of the surrogate, and a party to the proceedings under which it was had, did not then disclose the existence of his mortgage; especially where the mortgagee was in open and notorious possession of the premises at the time of such sale, and neither did nor said anything actually tending to mislead the purchaser, as to the character of his title or possession. Under such circumstances, the purchaser is bound to make active and particular inquiries, if he desires to be protected against the title of a party in actual and open possession (*Sahler* agt. *Signer*, 44 Barb. 606).

ERROR.

1. When one accused of the crime of murder is required to account for his whereabouts at a particular time, to avoid the force of criminating circumstances, his omission to produce such evidence is not, in law, conclusive of the facts in dispute (*Gordon* agt. *People*, 33 N. Y. R. 501).
2. The absence of an attempt to account for his whereabouts, when it appears to be in the power of the prisoner to do so, is strong presumptive evidence against him (*Id*).
3. But the force of such circumstances must be left for the consideration of the jury; and it is error for the court to instruct them that it is of a "conclusive character;" or that, by such omission, doubtful evidence of guilt "ripens into certainty" (*Id*).

EVIDENCE.

1. In an action to set aside as fraudulent and void as against creditors, a sale of merchandise made by S. & Co. in August, 1861, the judge admitted evidence of an assignment made by S. to his son, in May, 1861, and of the

consideration therefor, and the manner of payment: *Held*, that the assignment having occurred after the embarrassment of S. & Co. commenced, and appearing to be a part of the general plan of S. to place his property beyond the reach of his creditors, upon execution, the inquiry was clearly within the rule in respect to evidence of contemporaneous frauds (*Angrave* agt. *Stone*, 45 Barb. 35).

2. *Held*, also, that proof that several of the notes given by the purchasers of the debtor's stock of goods, at the alleged fraudulent sale, had been paid since the commencement of the action, was properly excluded (*Id*).
3. It is no error to admit testimony irrelevant at the time, if it is afterwards made pertinent by other testimony (*Black* agt. *The Camden and Amboy Railroad Co.* 45 Barb. 40).
4. Where a witness, in answer to the question whether T. was able to pay his debts, at a time specified, stated that he was not, and then proceeded to state numerous facts touching the property of T. and his indebtedness, showing an intimate acquaintance with the condition of T. and his utter insolvency: *Held*, that no error was committed in receiving this evidence (*Thompson* agt. *Hall*, 45 Barb. 214).
5. When one accused of the crime of murder is required to account for his whereabouts at a particular time, to avoid the force of criminating circumstances, his omission to produce such evidence is not, in law, conclusive of the facts in dispute (*Gordon* agt. *The People*, 33 N. Y. R. 501).
6. The absence of an attempt to account for his whereabouts, when it appears to be in the power of the prisoner to do so, is strong presumptive evidence against him (*Id*).
7. But the force of such circumstance must be left for the consideration of the jury; and it is error for the court to instruct them that it is of a "conclusive character;" or that, by such omission, doubtful evidence of guilt "ripens into certainty" (*Id*).
8. The good faith of one warranting a horse to be sound at the time of sale does not affect the question of damage for a breach of the warranty (*Brisban* agt. *Parsons*, 33 N. Y. R. 332).
9. Where, in an action before a justice of the peace, for trespasses done upon the plaintiffs' land by the defendant's cattle and horses, the only evidence to show the amount of the plaintiffs'

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- damages, or from which the justice could properly determine the amount was the *opinion* of a witness: *Held*, that there was not sufficient legal evidence in the case to sustain the judgment (*Armstrong* agt. *Smith*, 44 *Barb.* 120).
10. After the dissolution of a partnership by the death of one of its members, the survivor holds the assets still, as partnership property, and by virtue of his original power as partner. Hence he is in no sense the assignee of the deceased partner; and the restriction of section 899 of the Code of Procedure, as to the reception of evidence of transactions with a deceased person, against the executors or assignees of the deceased, does not extend to an action against him (*Tremper* agt. *Conklin*, 44 *Barb.* 456).
 11. Where loans are made, and securities for repayment are taken, such cases are in equity made exceptions to the general rule that when written contracts are made, the rights of the parties must be determined by the writing, unaffected by parol proof. In that class of cases, whatever the form of the instrument may be, it may be shown by parol evidence that the nature of the transaction was a loan of money, and that the writings, whatever may be their form, were intended as security for repayment (*Tibbs* agt. *Morris*, 44 *Barb.* 188).
 12. In all cases where the real transaction between the parties was a loan, and the writings were executed as a security therefor, parol evidence is admissible; and when such fact satisfactorily appears, equity will give effect to the writings according to the true intent of the parties (*Id.*).
 13. In an action to recover damages for a breach of a warranty in the exchange of a horse by the plaintiff, for a yoke of cattle owned by the defendant, a witness was asked, "What was the character of the cattle, orderly or disorderly?" *Held*, that the question called for the *opinion* of the witness as to a matter which could not properly be established by that species of evidence, and that the justice erred in allowing it to be answered. There is no rule of evidence which authorizes proof of the character of animals in that manner. The court, or jury, must form their conclusions from the proof of facts, and not from the opinion of witnesses (*Strevel* agt. *Hempstead*, 44 *Barb.* 518).
 14. The acts of a sheriff in the return of a process, so far as the rights of parties are concerned, must be taken as true when they arise collaterally, and can only be impeached by direct proceedings, to which the officer is a party; or rectified upon a summary application to the court to correct or set aside the return (*Sperling* agt. *Levy*, 1 *Daly*, 85).
 15. Questions to a witness whether certain representations alleged in the complaint were made "with intent to deceive or mislead:" and whether in his representations, "he spoke and acted in good faith, and in the belief that what he said was true: *Held*, properly excluded (*Ballard* agt. *Lockwood*, 1 *Daly*, 158).
 16. The registry of a vessel at the custom house is *prima facie* evidence to charge a person as owner, only where he is connected with its procurement, or in some way adopts it as his act. Where he actually procures such registry, and makes affidavit stating that he is owner, it is evidence to charge him, although it may be rebutted (*Bryan* agt. *Bowles*, 1 *Daly*, 171).
 17. Where a bill of sale, absolute on its face, bore date June, 1856, and the registry pursuant thereto was made December, 1857, evidence to show that the bill of sale was by way of mortgage, and did not take effect absolutely till the latter date, and that the vendee did not enter into possession until such latter date, is proper, and should be admitted to rebut the presumption of ownership, in an action to charge the mortgagee as owner of the ship (*Id.*).
 18. The coercion of the wife which is supposed to exist in all cases of tort, committed by her in the presence or by the direction of her husband, and for which the husband alone is presumptively liable, is but a presumption of law, which may be repelled by proof (*Cassin* agt. *Delaney*, 1 *Daly*, 224).
 19. And where the evidence justified the referee in his conclusion that the wrongful act of the wife was voluntary on her part, and was her individual act, and although in some respects done in the presence and company of her husband, yet was not done by his command or coercion: *Held*, that the court will assume as a matter of fact that the legal presumption of coercion of the wife has been repelled by proof (*Id.*).
 20. A written contract may be interpreted by the local customs in refer-

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ence to which it was made, and it is error to exclude evidence of such contents (*Id.*).

21. As between the lessor of a bulkhead and the lessor of the adjoining pier, evidence of the custom of the port is admissible to show how the wharfrage is collectible for the use of the bulkhead, and to what extent for the use of the pier (*Maugham* *ag.* *Farrington*, 1 *Daly*, 226).
22. Admissions are a species of evidence usually received with great caution from the ease with which they can be fabricated, and the liability to misapprehend what was said, but where a positive admission by the parties to the suit who are competent witnesses, is sworn to, and they neither contradict, qualify, nor offer any explanation of it, it then becomes evidence of a very satisfactory character (*Hadden* *ag.* *N. Y. Silk Manf. Co.* 1 *Daly*, 288).
23. Parol evidence is admissible that the consideration on instrument under seal, acknowledged to have been not in fact paid; a restriction that such evidence not have the effect of instrument, so as to run the want of any consideration (*Conant*, 1 *Daly*, 460).
24. The answer of a witness that the consideration of a sale of chattels was a sum of money and "one hundred acres of land," is not open to objection on the ground that it gives the contents of a deed of land not produced on the trial (*Reynolds* *ag.* *Kelly*, 1 *Daly*, 289).
25. The rule that questions arising upon conflicting evidence must be left to the tribunal that hears the testimony, and asks the witnesses upon the stand, is inflexible, and the appellate court cannot invade it merely because it thinks the case warranted a different conclusion (*Id.*).
26. As a general rule, parol evidence is always admissible to ascertain the nature and qualities of the subject to which an instrument refers, when evidence was excluded tending to show that it was the understanding of both parties, lessor was executed, that the or rear yards were intended to be embraced in it: *Held*, a new trial will be ordered (*Thompson*, 1 *Daly*, 36).
27. To entitle a written contract between one of the parties and a third person to be admitted in evidence, its pertinency must be first shown (*Smith* *ag.* *Pivris*, 1 *Daly*, 12).
28. The defendant on the trial testified that he had had no other conversation with the plaintiff, than that sworn to by him. He then put in evidence a certain mechanic's lien proceeding, and testified. The plaintiff was recalled and testified, that he had had another conversation than that testified to by the defendant, and then detailed such conversation relative to the mechanic's lien proceeding. The defendant offered himself as a witness to contradict the plaintiff's version of such conversation, which offer the justice refused: *Held*, error. The testimony proposed by the defendant was not to contradict his own previous testimony, but to obviate the effect of plaintiff's testimony as to the lien proceeding (*Id.*).
29. A contractor failed to complete his contract, and the owner was compelled to complete the building. In an action by a sub-contractor against the owner for work and materials, for which a lien had been filed: *Held*, that the defendant might prove on the trial what it had actually cost him to complete the building, for the purpose of showing that nothing was due to the contractor, and, consequently, nothing due to the plaintiff, as sub-contractor (*Id.*).
30. It seems, that the plaintiff has a right to prove the ownership of the party charged, however numerous the record-evidences are to the contrary, provided that those evidences were created for the purpose of defrauding him, or defeating claims arising under the lien law (*Bedley* *ag.* *Johnson*, 1 *Daly*, 61).
31. The finding of a jury on a question of fact, upon which there is conflicting evidence, is conclusive, and cannot, except in extreme cases, be reviewed on appeal (*Dasher* *ag.* *Meyer*, *ante*, 573).
32. A party cannot make his own declarations evidence in his own favor, where they are not called for by, or are not in response to anything said by the opposite party (*Id.*).
33. The admission of improper testimony upon a material issue, is not a technical error, and cannot be disregarded, though there may be upon the same question other competent and sufficient evidence. The court cannot say that the jury were not influenced by the illegal testimony (*Id.*).

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84. The legal rule or measure of damages for a breach of warranty of property sold, is the difference between the value of the property as it really was, and what its value would have been had it corresponded with the warranty (*Id.*).
85. The question to the witnesses, "what is the difference in value?" was improper and inadmissible. In this form it tended to elicit, and required or admitted the opinion of the witnesses upon the rule or measure of damages, and upon the amount of the damages the plaintiff was entitled to recover. A witness cannot thus be put directly in the place of the court and jury (*Id.*).
86. The value of property may be proved by the opinion of witnesses who are well acquainted with the value of similar property; but its difference in value in one condition, and in another, cannot be so shown, being a conclusion of the witness upon a mixed question of law and fact. He may give his opinion of the value of the property in one condition, and its value in another; but he should first state the facts within his knowledge, upon which he founds his valuation, to enable the jury to appreciate his estimate, and the jury should be left to draw their own conclusion as to the difference of value (*Id.*).
87. *Nellis* agt. *McCarn* (35 Barb. 115), and *Harpending* agt. *Shoemaker* (87 Barb. 270), as to the admissibility of opinion on the question of damages, are in conflict with the long series of adjudged cases on the subject (*Id.*).
88. The objection to the inquiry in relation to the difference of value, was sufficiently specific to raise the question, whether the opinion of the witnesses was admissible, and it was not necessary to have repeated the objection to the similar inquiry of the witness, *Allen Miller*, it having been interposed to the question to the next previous witness, and overruled by the justice (*Id.*).
89. Where competent evidence is offered on the trial, and rejected by the justice; and at the time the justice makes his return, or amended return on appeal, he recollects the fact, or by a proper effort to refresh his memory, he can bring the facts to his recollection; and if he intentionally omits or neglects to use such effort, with a design on his part to prevent a reversal of the judgment, and wholly neglects to return to such fact, he is liable in action of damages for a false return, to the whole amount of damages which the appellant may show he has sustained in consequence of such false return (*MacDonell* agt. *Buffum*, ante, 154).
40. The justice in such action cannot sustain his defense, that his ruling, rejecting the evidence, if actually made, was right under the pleadings; that such evidence was not receivable under a denial answer; that it was new matter, and should have been pleaded; where it is shown that the action tried before him was one for carelessly and negligently running against the plaintiff's wagon, and injuring it to his damage of \$50, the defendant's answer being a denial merely; and the evidence offered by the defendant and rejected by the justice, tended to show that the negligence on the part of the plaintiff contributed to the injury (*Id.*).
41. This evidence should have been received under the denial answer, as it tended to prove that the plaintiff had no cause of action; consequently it was not necessary to set it up and plead it as new matter (*Id.*).
42. A point which is waived and not argued by counsel at the hearing of the appeal, ought to be examined by the court on their own motion, if any member deems it a material ground for granting a new trial (*Artisans' Bank* agt. *Baokus*, ante, 242).
43. Where there is a conflict of testimony as to when and by whom the alteration of the date of a note, in suit, was made, which alteration is palpable on its face, it is a proper question to be left to the jury to decide, although the action is against the indorser (*Id.*).
- See CONTRACT, 14, 15.

EVICTION.

1. Where there is no disturbance of actual possession, or where the holding over by the landlord is not with the intent of keeping the tenant out of possession, after he has become entitled to it, there can be no pretence of an eviction (*Vanderpoel* agt. *Smith*, 1 Daly, 311).
2. The plaintiff demised to the defendants a plot of ground for ten years, which they used as a lumber yard, reserving to himself the right to occupy a small wooden building upon the land, for a year and a half, and which he used for the storage of certain articles one day over the time, having received no intimation from

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the lessees of their intention or wish to use it. Upon that day they notified him of their intention to remove, upon the ground that he had broken the lease by withholding a part of the premises, and immediately commenced removing, which occupied them eighteen days: *Held*, that there was no disturbance of the lessees' possession, as they had never been in occupation of the building, and as the holding over was with no design to retain it against their wish, it was simply an attempt to get up an eviction, and constituted no defense to an action for the rent (*Id*).

See LANDLORD AND TENANT.

EXCISE LAW.

1. The "act to regulate the sale of intoxicating liquors within the metropolitan police district of the state of New York," passed April 14, 1866, is not unconstitutional, as being in violation of section 16, article 3, of the constitution of this state, which provides that no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be embraced in the title (*In the Matter of James De Vaucene, ante, 289*).
2. If it be conceded that the act is a local one, it is nevertheless valid, for it does not embrace more than one subject—the regulation of the use of ardent and spirituous liquors, wines, ale or beer, mentioned therein (*Id*).
3. It is settled law, that it is competent for the legislature to regulate the sale and disposition of liquors. Such is the effect of the provisions of this act. Therefore, the third section of the act is not unconstitutional, as tending to divest the owner of his property without due compensation (*Id*).
4. It is well settled that a law invalid in some of its provisions, may, nevertheless, be valid, and enforced as to the residue (*Id*).
5. Where the question raised under this act is, whether the sale by a person of ardent and spirituous liquors mentioned therein, without a license granted by the board of excise, subjects him to arrest and imprisonment, upon the complaint made against him? the court must decide that such sale is in express terms prohibited by the act, and is declared to be an offense punishable by fine or imprisonment, or both. The act constitutes

this a distinct and separate offense, having no connection with any other (*Id*).

6. A license granted by the commissioners of excise of Seneca county, to D., recited that he was a resident of R., in said county, and licensed him to sell strong and spirituous liquors and wines, to be drank in his house, as an inn or tavern. D. in fact, at the time resided in the town of T., in the county of Yates, and had ever since resided there. Under this license D. kept a mere recess or drinking saloon in a room in his warehouse, situated in the waters of the Seneca lake, a few feet from the western shore thereof, and a few yards from the county line, within the town of R.: *Held*, that the judge was right in instructing the jury that D.'s license was void and afforded him no protection, if he was at the time it was applied for and granted, a resident of the town of T: *Held, also*, that such license if otherwise valid, did not authorize sales to be made in a mere drinking saloon in the corner of a warehouse. That it only authorized such sales to be made in an inn, tavern or hotel, kept by D. And that in order to justify the sale of liquor under such a license, the licensee should show that he did in fact keep such inn, tavern or hotel, and that the liquors thus sold were sold for the purpose of being drank there (*The People agt. Davis, 45 Barb. 494*).

EXECUTORS AND ADMINISTRATORS.

1. Where an executor works out a highway tax personally, instead of paying the money, or hiring another person to do the work, he should be allowed therefor, in his account (*Lansing agt. Lansing, 45 Barb. 182*).
2. An executor will not be charged with compound interest for neglecting to invest the interest accruing and received by him, annually, according to the directions of the will, where he states in his account that he has tried to keep the fund, together with the accrued and accumulated interest, invested and re-invested as required by the will, but has not been able to do any better than is stated in the account; and there is nothing to disprove that allegation, nor to show that he used the funds in his own business, or made any profit from their use; or that he was guilty of any gross delinquency or violation of duty (*Id*).
3. Where a will requires an executor to

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- invest in real estate securities, he should, if possible, pursue the directions of the testator; but if no such securities are offered, he will be justified, in the exercise of a sound discretion, in depositing the fund in a savings bank (*Id*).
4. A trustee or executor is required, in making investments, to conduct himself faithfully, and to exercise a sound discretion; and when he observes that prudence and intelligence which is demanded of a man in the management of his own affairs, not in reference to large gains, but to the safety of the principal, and to its probable income, he should be sustained (*Per MILLER, J.*) (*Id*).
 5. An executor and trustee, who has been removed by the surrogate from his office, is not a necessary party to a conveyance made by his co-executors, of land sold under an act of the legislature, which authorized a sale to be made by the trustees who held the property under the will, at the time of the passage of the act (*Matter of the Petition of Bull*, 45 Barb. 884).
 6. Three of the executors named in a will qualified. B., one of them, having left the country, was removed by the surrogate, and the other two acted alone. A statute was subsequently passed empowering the supreme court to authorize a sale of the real estate. It referred to the property as held in trust by the executors of T. under his will; required notice of the application to sell to be served on the two acting executors, by name, "as executors of T.;" authorized the court to direct conveyances to be executed "by the said trustees;" and provided that all such conveyances, so made, if executed by the trustees as aforesaid, should be sufficient "to vest in the purchaser a fee simple absolute." *Held*, that the intent of the legislature was, that the deeds should be executed by the acting executors; and that it was not necessary that B. should join in the conveyances (*Id*).
 7. On appeal from an order of the special term granting costs against executors, where the judge, on the motion, finds that the application to the executors was sufficient, and that they should have offered to refer, the general term will not review his finding of facts on that question (*Niblo* agt. *Binsse*, ante, 476).
 8. An extra allowance of costs against executors, depends on the same inquiry as the question of the recovery of costs against them (*Id*).
 9. Where, after the entry of judgment against executors, the judge at special term decides the question of costs and an extra allowance in favor of the plaintiff, it is proper to have the order entered *nunc pro tunc*, as of the day of entering the judgment (*Id*).
 10. Where a married woman authorized her husband to contract for work and materials for a dwelling house she was erecting upon her separate estate, and for the repairs of other buildings also belonging to her estate, which contract was partially executed during her life, and was completed after her death: *Held*, that her husband, to whom she had left a life interest in her estate after the payment of a certain legacy, and appointed her executor, with power to manage, mortgage or sell her estate, and to invest the proceeds as he should deem most advantageous for those interested, was not liable in his individual capacity for what was done under the contract either before or after the wife's death; that he was answerable only in his representative character as her executor, and having died without paying the debt, that the administrator of the estate with the will annexed, was bound to pay the debt out of assets in his hand (*Riblet* agt. *Wallis* 1 *Daly*, 360).
 11. The rule that an executor, if he have sufficient assets, is liable to a third person, who, as an act of duty or necessity, has provided for the interment of the deceased, is the same in the case of an administrator; and a person who defrays the necessary funeral expenses of an intestate, though before letters of administration are granted, is entitled to be reimbursed out of the assets which come into the hands of the administrator (*Rappelyea* agt. *Russell*, 1 *Daly*, 214).
 12. An administrator, having assets in his hands, who refuses or neglects to pay the funeral expenses of the intestate, being required to do so, is individually liable at the suit of the person who has been at the expense of the funeral (*Id*).
- See SALE, 1, 2, 3, 4.
- See LEGACY, 1, 2.
- ### EXCEPTIONS.
1. Where a cause, in which there are different counts or causes of action, is brought to trial, and evidence is given by the plaintiff affecting all the

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causes of action, at the close of which the defendant moves for a non-suit as to one of the separate causes of action, the granting of such non-suit, and continuing the action as to the other causes, is of doubtful propriety (*Meyer* agt. *Goodell*, ante, 456).

3. It leaves all the evidence relating to that branch of the case before the jury: while the defendant, by the non-suit, may suppress the testimony on that subject immaterial, and omitted to contradict or explain it. He however has a remedy, by moving the court to strike out the testimony relating to that branch of the case (*Id.*).

4. If the defendant does not take this course, he cannot take a valid exception to the permission of the opposite counsel being allowed to comment on such testimony to the jury; as the evidence was properly taken in the case, and had not been stricken out, the fact of the declaration of the judge that he did not consider this cause of action sustained, did not have the effect to remove the evidence from the case (*Id.*).

5. The refusal of the judge to open the case and admit evidence, after the summing up to the jury was through, is no proper ground of exception. Neither would the admission of evidence under such circumstances be considered a good ground of exception. In both respects it is a matter of discretion with the judge (*Id.*).

6. An exception will not lie to the declaration of the judge to the defendant's counsel, that in his opinion it is unnecessary to examine witnesses for the defense, and the jury find for the plaintiff (*Id.*).

7. An exception will not lie to the refusal of the judge to recall and re-examine a witness as to certain facts which counsel alleges the judge has incorrectly stated in his recapitulation to the jury (*Id.*).

8. An exception will not lie to a permission or refusal of the judge to recall a witness for re-examination after his examination has been finished (*Id.*).

9. An exception will not lie to the refusal of the judge to receive new evidence offered by counsel after he has rested. All these cases are within the discretion of the judge, and are not reviewable (*Id.*).

10. It is a well settled principle of law that in an action for fraudulent representations, other contemporaneous acts of fraud of a similar character, may

be given in evidence for such a cause. And where such evidence is before the jury, although the particular cause of action in which it was given has been dismissed, it is not error in the judge, in charging the jury, to say that they may take such evidence into consideration (*Id.*).

11. It serves, that an exception to the finding of the referee in general terms, as "that the plaintiff excepts to each and every one of the decisions and rulings of the referee against the plaintiff on the trial of this action, severally, separately and distinctively," amounts to nothing (*Newell* agt. *Dwy*, 33 N. Y. R. 33).

EXECUTION.

1. When a deputy sheriff posted a notice of sale on execution in a grocery, and the wind having blown it down it was picked up and laid upon the counter, the defendant, after inquiring why had left any notice there, he notice and carried it away, "he didn't want any such with his name on it," and was his business to take them and he would take them all find, that these facts brought within the statute which any person who shall "take notice" a notice of that date liable to a penalty of \$20 (*1st ed. 608, § 58*). The object of the statute was to prevent any man with the paper put up by him, and the contents thereof, to defeat its purpose—that is, notice of the sale (*Murphy* agt. *Barb.* 139).

FALSE RETURN.

1. A justice of the peace in making a return to an appeal, acts ministerially. And he is liable for a false return to an appeal for any damages which a party to such appeal may sustain (*MacDonell* agt. *Dyffurn*, ante, 154).

2. Where competent evidence is offered on the trial, and rejected by the justice; and at the time the justice makes his return, or amended return on appeal, he recollects the fact, or by a proper effort to refresh his memory, he can bring the facts to his recollection; and if he intentionally omits or neglects to use such effort, with a design on his part to prevent a reversal of the judgment, and wholly neglects to return such fact, he is liable in an action of damages for a false return, to the whole amount of damages

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which the appellant may show he has sustained in consequence of such false return (*Id.*).

3. The justice in such action cannot sustain his defense, that his ruling, rejecting the evidence, if actually made, was right under the pleadings; that such evidence was not receivable under a *denial* answer; that it was *new matter*, and should have been pleaded; where it is shown that the action tried before him was one for carelessly and negligently running against the plaintiff's wagon, and injuring it to his damage of \$50, the defendant's answer being a *denial* merely; and the evidence offered by the defendant and rejected by the justice, tended to show that the *negligence on the part of the plaintiff contributed to the injury* (*Id.*).

4. This evidence should have been received under the denial answer, as it tended to prove that the plaintiff had no cause of action; consequently it was not necessary to set it up and plead it as new matter (*Id.*).

FENCES.

1. An appraisal, by fence viewers, of the expense of making, by one party, of that portion of a division fence which they have decided another party shall maintain, is not necessary to enable the former to maintain an action for the recovery of such expense. Such expense may be proved by witnesses who know, or can judge, what it was (*Perkins* agt. *Perkins*, 44 Barb. 134).

2. Where a person chooses to let his land "lie open to a public common," as authorized by the act of 1860, to avoid maintaining a just proportion of the division fence between his land and that of an adjoining proprietor, he must do what amounts to a license to the people of the town to go upon it, and allow their cattle to feed upon it, without being trespassers, until he revokes such license and builds, or pays the expense of building, his just proportion of such division fence (*Id.*).

3. Before a party can claim that he has chosen to let his land "lie open to a public common," he must have given the adjoining owner, or the fence viewers, notice that he has so chosen; otherwise he will be liable to the adjoining owner for the expense of building his proportion of the division fence (*Id.*).

FIXTURES.

1. In an action by a tenant to recover damages for the unlawful removal of fixtures during his possession of the premises, proof of a demand is unnecessary. And a judgment rendered for the defendant in such an action, on the ground that no demand for the possession of the fixtures had been shown, will be reversed (*Beardsley* agt. *Sherman*, 1 Daly, 325).

2. The adjustment of gas fixtures to a gas pipe is not such an annexation to the freehold as to make them a part of the realty, and subject to the operation of a grant thereof (*Shaw* agt. *Lenke*, 1 Daly, 487).

FORECLOSURE SUIT.

1. The surplus money arising on a sale of land under a mortgage foreclosure, stand in the place of the land in respect to those having liens or vested rights therein; and the widow of the owner of the equity of redemption, is entitled to dower in the surplus, as she was in the land before the sale (*The People* agt. *The Third Avenue Railroad Co.* 45 Barb. 63).

2. Where the widow of a mortgagor is made a party defendant in a foreclosure suit, but omits to appear or assert her claim for dower, she is not barred of her action for her share of the surplus moneys, by any order for their distribution, made in the foreclosure suit (*SUTHERLAND, J. dissented*). (*Id.*).

3. Nor is she barred from bringing such an action against the person to whom the surplus moneys were assigned in the foreclosure suit by reason of her neglect or omission to assert her claim, on being made a party to a suit brought by that person, for the settlement and closing of his trust as assignee of the mortgagor (*Id.*).

4. The right of priority of sale in a foreclosure suit where the mortgaged premises have been sold subsequent to the mortgage, does not depend upon warranty. But it arises out of the application of equitable principles under which the rights and obligations of sureties are ascertained (*Woods* agt. *Spalding*, 45 Barb. 602).

5. Where those equities are equal, as they are between the purchasers of different portions of the premises covered by the mortgage, he who is prior in time is deemed prior in right. Hence the premises alienated are re-

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quired to be sold, to satisfy the common incumbrance, in the inverse order of alienation (*Id.*).

6. This rule is applied not only to determine the equitable position of those who have acquired the legal title, but also for the purpose of protecting the interest of incumbrancers, whether by mortgage or judgment (*Id.*).
7. Where different portions of the mortgaged premises have been sold under judgments, those portions are to stand in the order of sale in a foreclosure suit, as of the times when the judgments respectively became liens, and not as of the times when conveyances therefor were executed by the sheriff (*Id.*).
8. The protection afforded by equity to different purchasers of portions of the mortgaged premises, cannot be extended beyond the period when the judgments under which they purchased became liens upon the land (*Id.*).

FORMER ADJUDICATION.

1. The record of a dismissal of the complaint between the same parties in another court, for the purpose of proving a former adjudication, is inadmissible in evidence, unless it is shown that such dismissal was a judicial determination of the same point in controversy here (*Smith* agt. *Ferris*, 1 *Daly*, 18).
2. A suit against a vessel in the United States court for advances, is no defense to an action upon the lien of the master of the vessel on the freight, unless the plaintiffs had such lien at the time of the commencement of the action *in rem* (*Sorley* agt. *Brewer*, 1 *Daly*, 79).
3. Where a claim has been interposed in a former action, by way of set-off, and has been duly passed upon in such action, it is *res adjudicata*, and the former action is a bar to a new action by the defendant against the plaintiff in the former suit (*Rogers* agt. *Rogers*, 1 *Daly*, 194).

FORMER SUIT OR JUDGMENT.

1. It is a fundamental rule, based upon the maxim, "*inter est reipublicæ ut sit finis litium*"—that the judgment of a court of competent jurisdiction, between the same parties or privies, upon the same matter or subject coming in question in another suit is final and conclusive on all points di-

rectly involved and necessarily determined. In the application of this rule the question to be determined is, what was decided in the former suit. And upon this question the record must control, where it clearly appears on the face what was the matter tried and passed upon. If it does not so appear, it may be shown by parol what was in fact tried, within the issues made by the pleadings (*Williams* agt. *Fitzhugh*, 44 *Barb.* 321).

2. Held, also, that it could not be said, upon the record of judgment in that action, that the validity of the \$5,000 notes, given in April, was necessarily involved in the decision that the notes given in July were usurious. And that the question of their validity when given was not put in issue, nor necessarily decided and determined in that suit (*Id.*).
3. In an action by a sheriff upon the bond given by a deputy sheriff on receiving his appointment, to indemnify the sheriff against his acts or omissions as such deputy, the surety in such bond is concluded by a judgment recovered against the sheriff in an action brought against him for the neglect of the deputy to collect an execution, of which action the deputy had notice, and which he defended; although no notice of such suit was given to the surety. And the surety is not at liberty in such action upon the bond, to litigate over again the liability of the sheriff, in the former action; nor to prove facts in exoneration of his principal which the latter set up as a defense in the former suit (*Fay* agt. *Ames*, 44 *Barb.* 327).

FRAUD.

1. If one party is trusted to reduce a contract to writing, he is bound to do it truly, and any variation from it, either by omitting some of its terms, or by inserting provisions not embraced in it, if not known to the other party, and distinctly assented to by him, is a clear fraud (*Botsford* agt. *McLean*, 45 *Barb.* 478).
2. Fraud and fraudulent intent, is always a question of fact for the jury; and although there are cases where it is said the law presumes fraud from certain acts, yet that presumption is only the conclusion of the law upon the facts as they are proven (*Wakeman* agt. *Dalley*, 44 *Barb.* 493).
3. In an action to recover damages sustained by reason of the fraudulent representations of the defendant con-

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cerning the credit and good standing of another, doing business under the designation of agent, it is wholly immaterial whether or not it is the understanding in mercantile circles that a person doing business under such designation is not responsible. And in such an action, it is immaterial whether the plaintiff received any information as to the standing of the party from mercantile agencies, or whether the plaintiff was a subscriber to such agencies; the question to be tried being whether the defendant made the statements untruly, and from bad motives (*Ballard* agt. *Lookwood*, 1 *Daly*, 158).

FREIGHT.

4. In the absence of a special agreement to the contrary, freight paid in advance may be recovered back, where, by reason of the capture or shipwreck of the vessel, or for any other cause, the goods are not carried to the place of their destination. And this rule of law cannot be controlled by proof of any usage to the contrary (*Emery* agt. *Dunbar*, 1 *Daly*, 408).

FUTURE EARNINGS.

1. The theory upon which future earnings, or the results of future labor, are sometimes allowed to be anticipated and appropriated to the payment or security of a present indebtedness, is that they are connected with a contract or employment already in existence, or are the fruit of advances made, or supplies furnished, to carry on the business out of which the future property or earnings arise; and then the pledge attaches, not to such property or earnings from the moment of the contract, but from the moment they spring into existence by virtue of the contract of the parties that they shall do so. But this doctrine does not extend so far as to embrace the results of labor undefined in character and unrestricted in time, which arise out of an employment having no connection with the nature or object of the indebtedness, and having in fact no real or contemplated existence at the time the contract is entered into (*Cooper* agt. *Douglass*, 44 *Barb.* 409).

GAS LIGHT COMPANIES.

1. Gas light companies possess, by virtue of their charters, powers and privileges, which others cannot exercise, and the statutory duty is imposed up-

on them to furnish gas on payment of all moneys due from applicants (*The People ex rel. Kennedy* agt. *The Manhattan Gas Light Co.* 45 *Barb.* 136).

2. If an applicant is already indebted to a gas company, the company may shut off the supply of gas, and refuse to furnish any more; especially if the applicant avows his insolvency, and his inability to pay for gas previously furnished (*Id.*).
3. Where an individual applies to a gas company for gas, and the same is furnished to him by the company, for a period, without objection on account of a former indebtedness, this will not deprive the company of the right to reject a subsequent application, on the ground of such indebtedness (*Id.*).

GIFT.

1. It is essential to a valid gift by parol that there should be an actual or symbolical delivery. The title does not pass unless possession, or the means of obtaining it are conferred by the donor and accepted by the donee (*Cooper* agt. *Burr*, 45 *Barb.* 9).
2. The situation, relation and circumstances of the parties, and the subject of the gift may be taken into consideration in determining the intent to give, and the fact as to delivery (*Id.*).
3. A total exclusion of the power or means of resuming possession by the donor is not necessary (*Id.*).
4. C. who had been confined to her room by illness for nineteen or twenty years, and to her bed for five or six years prior to her death, kept in her room a bureau and trunks, containing gold and silver coin and jewelry. About six weeks before her decease, handing to the plaintiff, who had lived with and taken care of her for twenty-seven years, the keys of the bureau and trunks, she said: "Mary, here are these keys; I give them to you: they are the keys of my trunks and bureau; take them and keep them, and take good care of them; all my property and everything, I give to you; you have been a good girl to me, and be so still. * * * You know I have given it all to you, take whatever you please; it is all yours, but take good care of it." *Held*, that the language of the donor, accompanied by a delivery of the keys to the trunks and bureau, evinced the intention of the donor, and placed the donee in possession of the means of assuming ab-

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solnte control of the contents at her pleasure, and constituted a valid gift of the coin and jewelry in the trunks and bureau: *Held, also*, that the fact that the trunks and bureau, or their contents, were not removed, or even handled by the donee, was not a controlling consideration (*Id.*).

GOLD.

1. A party seeking to enforce in our courts, a judgment rendered abroad, which if paid there would have been paid in a currency equal to gold, cannot have the premium on gold added to the nominal amount of the debt (*Swanson* agt. *Cooke*, 45 *Barb.* 574).

GRANT.

1. In construing a grant, natural objects control courses and distances, when they conflict. In case of such a conflict, courts in the absence of all evidence to the contrary, must adopt and apply the rule of construction that all grants or conveyances are supposed to be made with reference to an actual view of the premises by the parties thereto (*Schoonmaker* agt. *Davis*, 44 *Barb.* 463).
2. And they will infer that the parties by actually traversing the line in accordance with the monuments which were fixed, or by some other means equally satisfactory, acquired a knowledge of the line sought to be established by the grant (*Id.*).

GUARANTY.

1. If the original debt or obligation rests upon a good consideration, this will support the promise of guaranty, if such promise be simultaneous with, or prior to, the original debt. But if that debt or obligation be first incurred and completed, there must be a new consideration for the promise to guaranty that debt (*Farnsworth* agt. *Clark*, 44 *Barb.* 601).
2. The defendant addressed a letter to S., introducing A. to him, and stating that A. wished to purchase some pure liquors on a credit of three months, for any amount not exceeding \$100; and adding that he, the defendant, considered A. perfectly good, and that he would indorse for him to that amount. S. without the knowledge or consent of the defendant, delivered the letter to the plaintiff, who, on the faith of it, furnished certain liquors to

A.: *Held*, 1. That the letter was not in itself a guaranty to the plaintiff for the price of the goods sold by him to A. 2. That the guaranty was conditional; to be created if required, and then by indorsement only. 3. That the defendant could not be made liable in any other form, until after a refusal by him to indorse A.'s note (*Stockbridge* agt. *Schoonmaker*, 45 *Barb.* 100).

GUARDIAN.

1. The Code (§ 816) makes the guardian of an infant, plaintiff, responsible for costs of the action, when they are adjudged against such infant, and provides that "payment thereof may be enforced by attachment." This means a process in the nature of a *ca. sa.* And it is not strictly necessary for the defendant to first issue his execution against the infant, in order to fasten the liability upon the guardian to entitle the defendant to his attachment, though this is perhaps the better practice. Nor is there any necessity of an order of the court to first bring the guardian into contempt, before the attachment can issue (*Grantman* agt. *Thrall*, ante, 464).
2. The issuing of the attachment results simply from the adjudication against the infant plaintiff. The measure of liability and the means of enforcement are prescribed by law, and the court cannot refuse to a party on a proper application the process which the law in terms gives him (*Id.*).
3. The word "may" in statutes has always been held to be imperative, and equivalent to *must* or *shall*, whenever the public or third persons have a claim *de jure* that the power should be exercised (*Id.*).
4. It is clear that the poverty of the guardian is no defense to a motion for the attachment (*Id.*).
5. The general guardian of infants has the same power over the property and estate of his wards, as a testamentary guardian; and can receive moneys secured to them by mortgage and discharge the mortgage, before the same becomes due (*Chapman* agt. *Tibbitts*, 83 *N. Y. R.* 289).

HABEAS CORPUS.

1. A person arrested or detained upon an order from the war office at Washington, by authority of the President, directing "Robert Martin to be transferred to General Hooker, for trial,"

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will be discharged on *habeas corpus*, where from the return it appears that he is charged with the offense of arson in the night time, in the city of New York, in November, 1864, and also with being at that time within the Federal lines as a spy; he being at the time an officer in the Confederate army, but disguising his rank and character in the dress of a citizen (*In the Matter of Robert Martin*, ante, 228).

2. By the restoration of peace, and the writ of *habeas corpus*, the military law and rule has become, as before the war, subordinate to the civil (*Id.*).
3. Arson is not a crime for which a prisoner can be tried by military court or commission, without a disregard of the provisions of the constitutions of both the state and the general government, securing a trial by jury (*Id.*).
4. There is no case where any person has ever been held or tried as a spy, who was not taken before he had returned from the territory held by his enemy, or who was not brought to trial and punishment during the existence of the war (*Id.*).
5. The prisoner, in this case, was not taken in the act of committing the offense charged against him of being a spy. He had returned within the lines of the Confederate forces, or had otherwise escaped, so that he was not arrested till after the Confederate armies had surrendered, been disbanded and sent to their homes, with the promise that they should not be further disturbed, if they remained there and engaged in peaceful pursuits (*Id.*).
6. The act of congress of March 8, 1863, authorizing a suspension of the writ of *habeas corpus*, was obviously aimed at "state or political prisoners," and was designed to enable the President to arrest, and detain as prisoners, persons charged with, or suspected of, some offense against the government—persons deemed dangerous to the government—and to suspend the privilege of the writ of *habeas corpus* as to all such persons. But the statute had no reference to enlisted soldiers of our army not accused of any crime; and was not designed to prevent their discharge, on *habeas corpus*, if illegally held as soldiers (*The People ex rel. Starkweather* agt. *Gaul* 44 Barb. 90).

HIGHWAYS.

1. In an action against the trustees of an incorporated village, to recover for injuries sustained by the plaintiff in consequence of a highway being out of repair, the defendants cannot be allowed to prove that the condition of the highway in question was worse in some other places, and especially in those portions out of the village bounds, than it was at the place of the injury. Where a statute imposes upon the trustees of a village, as commissioners of highways, the duty of keeping a bridge, or a highway, in repair, the duty extends not merely to the floor of the bridge, or the road bed of a highway, but to proper guards or railings on their sides or borders, when necessary for the safety or protection of the public (*Hyatt* agt. *Trustees of the village of Rondout*, 44 Barb. 385).
2. Where the trustees of a village are, by its charter, made commissioners of highways therein, if a road within the corporate limits is out of repair, and the trustees neglect to repair it, an absolute obligation and liability rest on them in regard thereto; and for an injury sustained by an individual in consequence of their negligence, the corporation is liable (*Id.*).
3. Commissioners of highways are not liable for the non-repair of highways within their jurisdiction if they have not the funds for that purpose, and are incapable of supplying themselves by law with such funds (*Id.*).
4. But whatever may be the rule in regard to commissioners of highways in towns, a different and more stringent rule has been applied to corporations and the trustees of villages (*Id.*).
5. Where successive owners of land have permitted the people at large to use the same as a public highway for twenty years or more, without interruption or objection, the same will be deemed a public highway; notwithstanding the owners of the land may not have intended to confer upon the overseers of highways the right to control the road as a public highway. The mere intention of the owners of the land is not material, under the statute declaring that all roads not recorded shall be deemed public highways from the mere fact that they have been used as such for twenty years or more. (2 R. S. 5th ed. 405, § 135.) (*Devenpeck* agt. *Lambert*, 44 Barb. 596.)

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6. The right of the people to land as a public highway irrevocably attaches, by the statute as soon as twenty years' uninterrupted use of it as a public highway expires. After a road has become a public highway, by user as such for twenty years or more, a person obstructing it incurs a penalty for so doing, although the commissioners of highways have neglected their duties in not ordering the overseer of highways to open such highway to the width of two rods at least, and in not causing it to be ascertained, described and entered of record in the town clerk's office. The commissioners of highways can maintain an action to recover the penalty of five dollars for obstructing such a highway (*Id.*).

HUSBAND AND WIFE.

1. In a common law action for money had and received, brought against husband and wife to recover back money paid as a usurious premium, upon a loan made by the wife, of moneys of her separate estate, where the evidence tends to show that the husband made the bargains with the plaintiff for the loan, and for the extensions of credit, for his wife, and that she knew the character of the bargains so made, it is proper to charge the jury that if the wife knew her husband was receiving money for his own benefit, from the borrower, on account of the loan, she would be liable for the money so paid to him (*Porter* agt. *Mount*, 45 Barb. 422).
2. If a wife loaning money which is her separate property, is cognizant of the acts of her husband acting in her behalf, in exacting a usurious premium, so as to taint the agreement as to her, with the usury, she will be liable to the borrower, in an action for money had and received, even though the money does not come to her hands, but is received by her husband and retained by him for his own benefit, with her knowledge and consent (*Id.*).
3. Having consented that her husband and agent shall receive the money upon the corrupt bargain, the wife cannot shield herself upon the plea that he has never paid it to her, but has kept it himself, by her consent. Payment to her agent, in such a case, is payment to her (*Id.*).
4. To reach a married woman's separate property now, she must be sued alone. If sued with her husband, a judgment against both is really a judgment against the husband, as at common law (*Per E. D. SMITH, J.*). (*Id.*).
5. Where a husband, who was married prior to the married woman's acts of 1848 and 1849, was indebted to his wife in the sum of \$1,000 for money arising from the sale of her separate real estate, which sum she had previous to those acts, lent to him, he agreeing to keep it for her, and treat it as her separate property, and repay it to her with interest: *Held*, that equity would hold him to be her trustee for that amount, and allow him to pay her the same, upon his becoming insolvent, in the same manner that he might pay any other creditor. But that to authorize him to prefer his wife as a creditor, it was necessary that the money in his hands should be held and regarded as between them, at and from the time of its receipt by him, as a loan from her; that he should be deemed to be in fact a debtor to her for the same; and that they should have constantly and intentionally treated the sum in his hands as her separate estate (*J. C. SMITH, J. dissented*). (*Woodworth* agt. *Sweet*, 44 Barb. 268).
6. *Held, also*, that the husband was not obliged to insist on his marital rights to his wife's personal property and choses in action; and that if he did not assert such rights, but expressly agreed with her not to do so, and acted upon this agreement, equity would allow him to pay her any money she might have temporarily lent him, under such circumstances (*Id.*).
7. Whenever a husband has received or borrowed the property of his wife under circumstances which in a court of equity would be regarded as creating a debt to her from him, and as entitling her to be considered and treated as his creditor therefor, he will be allowed to pay such debt from his property, in the same manner, and upon the same principles, on which he would be allowed to pay any other debt to any other creditor; and a payment to her, or a transfer of property to her, in consideration of such debt, will not be regarded as a gift, or a voluntary conveyance of property in fraud of his creditors (*Mc Carney* agt. *Welch*, 44 Barb. 271).
8. A married woman cannot sue her husband in an action for an assault and battery (*Longendyke* agt. *Longendyke*, 44 Barb. 366).
9. It was the purpose of the legislature, by the married woman's acts of 1848 and 1849, to confer new rights of pro-

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perty upon the wife, separate from and independent of her husband, and to enlarge and render more fixed and certain those already existing (*Abbey agt. Deyo*, 44 Barb. 374).

10. By the existing statute law of this state, a married woman may acquire the title to personal property by grant or purchase; and this purchase may be made in any of the ordinary modes known to the law, or to the course of business. It may be made by the payment of cash, for the property purchased, or she may buy on her own credit. And if a purchase be made by her, and the credit given to her, with the object of vesting the title in her, she will acquire thereby a title to the property in her own name, and as her sole and separate property. So the purchase may be made by herself in person, or by her authorized agent; and her husband may be that agent. And her trade or business, while it is carried on in her own name, or for her own benefit, may like all other trades and business, be conducted by herself personally, or through the instrumentality of others (*Id*).

INDICTMENT.

1. An indictment for a breach of the excise law alleged that the offense was committed "at the town of R., in the county of Seneca, and on the boundary of the two counties of Seneca and Yates, and within five hundred yards of such boundary." The proof showed the offense to have been committed in the town of R., in Seneca county, and within less than five hundred yards of the boundary line between the counties of Yates and Seneca, but not precisely upon such dividing line: *Held*, that in view of the statute which provides that when an offense shall be committed on the boundary of two counties, or within five hundred yards of such boundary, an indictment for the same may be found, and a trial and conviction had, in either of such counties, this could not be regarded as a *variance*, in any proper sense; and that the judge properly refused to discharge the prisoner, or order a verdict in his favor, on that ground (*The People agt. Davis*, 45 Barb. 494).
2. The boundary of each county for the purpose of jurisdiction over offenses, is by that provision of the statute extended five hundred yards into the adjacent county; and this space may very properly, by way of local descrip-

tion, be described as on the boundary and within five hundred yards of the boundary line (*Id*).

INFANT.

1. Where an infant has purchased real estate, and has taken and continued in possession after becoming of full age, and has exercised acts of ownership over the same, he will be deemed to have ratified the contract of purchase. An infant cannot retain the benefits of his contract, and thus affirm it, after becoming of age, and yet plead infancy to avoid the payment of the purchase money. What acts, after attaining full age, will amount to a ratification of the contract of an infant, elaborately discussed by *DAVIES, J* (*Henry agt. Root*, 38 N. Y. R. 526).
2. A minor who obtains property upon representations that he is of full age, is liable in an action of tort, either to recover the property back, or to recover damages upon the ground that it was wrongfully obtained (*Eckstein agt. Franks*, 1 Daly, 334).

INJUNCTION.

1. Where the plaintiff had made advances for the benefit of a vessel, and had taken an assignment of the master's lien on the freight therefor, and the owners of the vessel were insolvent: *Held*, a proper case for an injunction, and the appointment of a receiver to collect such freight, notwithstanding the allegations of the answer and affidavits showed that the defendants had chartered the vessel from the owners for such voyage (*Sorley agt. Brewer*, 1 Daly, 79).
2. The rule that the party has a remedy by action in the recovery of damages against a party for exceeding its powers, and therefore an *injunction* should not issue, may be proper as to individuals, but is not applicable where both parties represent the public, and where the loss must fall upon the public whoever succeeds (*Mayor, &c., of New York agt. The Board of Health, ante*, 385).
3. Where a judge has found that the extension of a railroad is a public nuisance, that alone, on a trial, entitles the plaintiffs to relief by injunction, although no damage be shown (*The People agt. The Third Avenue Railroad Co.* 45 Barb. 63).
4. If the necessity of the extension is not established, the extension is un-

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lawful. It is then the attempted exercise by the company of a valuable franchise, not authorized by law. This, independently of any other consideration, or proof, is a sufficient damage to uphold a decree for a perpetual injunction (*Id.*).

5. In a suit to restrain the extension of a railroad in a city, an injunction will not be granted against the city corporation, where there is no allegation that it is about to do, or that it threatens, any act whatever obstructing or incumbering the streets, or otherwise, in execution of the permission granted; and it is not alleged, nor does it appear, that the railroad company, in executing the ordinance, is the agent of the corporation (*The People* agt. *The New York and Harlem Railroad Co.* 45 Barb. 74).

6. The owner of land fronting on the East river in the city of New York, who has obtained a grant of land under water, to the exterior line, and is entitled thereby to wharfage at a pier in front of his land, cannot have an injunction to prevent the building of a pier beyond his grant in front of his pier, by parties claiming under a grant from the common council, where no authority has been given to fill up outside of the exterior line (*Taylor* agt. *Brookman*, 45 Barb. 106).

7. The remedy, in such a case, is by an action for damages, or of ejectment, if he has any title (*Id.*).

8. It seems, that in such a case the owner of the upland has no title to the land under water beyond the exterior line (*Id.*).

See BOARD OF HEALTH, 1, 2, 3, 4, 5, 6.

See QUARANTINE, 1, 2.

INNKEEPER.

1. Under the act of 1855, which provides that whenever the proprietor of a hotel shall provide a safe for the safe keeping of money, jewels and ornaments, and shall post a notice thereof, conspicuously in the rooms of the hotel, if a "guest shall neglect to deposit such money, jewels or ornaments, in such safe, the proprietor of such hotel shall not be liable for any loss of such money, &c., sustained by such guest, by theft or otherwise," the hotel keeper who has posted such a notice, is liable for losses occurring only when he has the actual possession and custody of the articles by their being placed in a safe provided.

Whilst they are out of the safe, they are to be regarded as within the personal care and custody of the guest, and not of the hotel keeper, and the latter, during that time, is relieved from responsibility (*Bendelson* agt. *French*, 44 Barb. 31).

2. An innkeeper is an insurer of property committed to his custody by a guest, unless the loss be due to the culpable negligence or fraud of the guest, or to the act of God or the public enemy (*Hewlett* agt. *Swift*, 33 N. Y. R. 571).

3. The rule that the landlord shall be held responsible for goods intrusted to him for safe keeping by the traveler, and subject to detention for his charges, is founded in considerations of public policy. The statute enables him to require the observance of appropriate precautions by the guest; but it does not absolve him from his obligation to respond for losses caused by the negligence of himself or his servants, or by the depredations of knaves or marauders, within or without the curtilage: *Held*, accordingly, that the innkeeper is responsible for the loss of the goods of his guest by fire, the cause of the fire being unknown, and the guest being free from negligence (*Id.*).

4. The liability of an innkeeper as an insurer, presupposes the relation of host and guest. He is not responsible, except as an ordinary bailee for hire, for the safe keeping of a horse left at the inn stable for the night, by one who is neither a lodger nor a guest: *Held*, that in such a case, the innkeeper was not liable for the loss of the horse, by a fire which consumed the stable, the proprietor being free from negligence. The case of *Mason* agt. *Thompson* (9 Pick. 280), disapproved (*Ingallsbee* agt. *Wood*; 83 N. Y. R. 577).

INSOLVENT'S DISCHARGE.

1. It is the right of a party affected, to assail an act of a public officer for want of jurisdiction; and he does not preclude himself from so doing by any agreement not to raise the question, even if founded on a sufficient consideration (*Grocers' National Bank* agt. *Clark*, ante, 115).

2. Appearing and participating in proceedings over which a court or officer has not jurisdiction, does not prevent a party from assailing them for want of it (*Id.*).

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3. Where an officer has authority and jurisdiction to grant a discharge to an imprisoned, insolvent debtor, under the Revised Statutes (*Art. 5, ch. 5, tit. 1, part 2*), a plaintiff in an action against such debtor, has a right to object to the discharge of the defendant from arrest, upon or by reason of his claim, unless it is a claim arising on contract (*Id.*).
4. And the plaintiff is not precluded from making such objection, by reason of his having appeared before the officer and opposed generally the debtor's application for his discharge (*Id.*).
5. The forms of the counts in a complaint, do not in all cases furnish the court the best evidence of the real nature of the plaintiff's claim. The facts out of which it originated must be ascertained, in order to comprehend the real ground of the action (*Id.*).
6. Where the first cause of action mentioned in the plaintiff's complaint is, what would have been called (when it had a name) *trover*; and the second cause of action *case*, to recover damages for fraudulently certifying bank checks, by means whereof a large sum of money was fraudulently extracted from the plaintiff: *Held*, that both causes of action are in *tort*, and not on contract (*Id.*).
7. The plaintiff might have waived the fraudulent conversion, and sued the defendant for so much money had and received to its use; but not having done so, the discharge of the defendant does not apply to his imprisonment upon the plaintiff's claim. His discharge applies only to debts arising on contract (*Id.*).

INSOLVENT.

1. The insolvent laws of a state cannot affect a creditor residing out of the state, at the time of the application for the discharge, who does not participate in the proceedings under such laws, even though his debt be a judgment recovered within such state (*Lester agt. Christalar, 1 Daly, 29*).
2. And a resident of this state, by an assignment to him of such judgment after that discharge, acquires a valid and subsisting interest, which is not affected by the discharge (*Id.*).
3. Whether a judgment recovered in this state is a contract to be made or executed in this state within the meaning of the insolvent law. *Query?* (*Id.*).

INSURANCE.

1. The words "*privilege for \$4,500 additional insurance*," written in the body of a policy of insurance: *Held*, to work a waiver of a subsequent printed condition in the policy, requiring notice to be given to the insurers of any other insurance (within the sum specified), and to have the same endorsed on the policy. The true intent and meaning is, that the insured may obtain further insurance without notice to the company, and without affecting their policy or their liability upon it, provided such additional insurance does not exceed \$4,500 (*Benedict agt. Ocean Ins. Co. 1 Daly, 9*).
2. Where it is shown that the company prepared the policy of insurance after a careful examination of the insured premises by their own surveyor, and with a full knowledge of the nature of the risk: *Held*, that any misdescription of the policy was the fault of the company, and the insured should not be called upon to bear the consequences (*Id.*).
3. A cellar is not one of the "stories" of a building (*Id.*).
4. Where in a policy of insurance, although a "time policy," a geographical track is declared, and the insured is specifically prohibited from entering certain ports: *Held*, that a voluntary voyage to any such prohibited port amounted to a breach of the warranty of the insured not to enter such ports, and that from that time the policy ceased to cover or protect the vessel. *Held, further*, that a permission to use one of the prohibited ports, indorsed on the policy, did not abrogate the warranty in the policy "not to use foreign ports or places in the Gulf of Mexico" (*Day agt. Orient Mutual Ins. Co. 1 Daly, 13*).
5. *Held, further*, that the subsequent return of the vessel in safety in no way revived or restored the original obligation of the insurers, and no action can be maintained for her loss after such deviation (*Id.*).
6. A note given for the purpose of complying with the provisions of the fifth section of the act of April, 1849, and forming a part of the original capital of the company contemplated by such act, is payable absolutely, without alleging or proving any loss or assessment by the company, &c (*Tuckerman agt. Brown, 33 N. Y. R. 297*).
7. Where such a note is given for the purpose of increasing the capital stock

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- of the company to the amount required by law, that it may pass the necessary examination of the commissioners to be appointed by the comptroller, upon an agreement that, after such examination, such note may be withdrawn and a lesser one be substituted therefor, such transaction and agreement is a fraud upon the law, and the maker of the note will continue to be liable thereon, though such note be withdrawn and destroyed (*Id.*).
8. Where, by an act of the legislature of Massachusetts, three independent mutual insurance companies are incorporated into one, under a new name, with a provision that the act "shall not affect the legal rights of any person," nor take effect until it shall be accepted by the members of said corporations respectively, at meetings called for that purpose," a member of one of the old corporations, not expressly assenting to such act, is not, by the mere force thereof, constituted a member of the new organization (*Gardner agt. Hamilton Mutual Ins. Co.* 33 N. Y. R. 421).
9. His rights as a member of one of the original corporations are in no way impaired by the act creating the new corporation; and he or his assignee must seek any remedies they may be entitled to, against the original corporation of which he was a member (*Id.*).
10. Until, by his assent, he becomes a member of the new corporation, there is no privity of contract between him and such corporation (*Id.*).
11. Where there is a provision in a contract of insurance that, instead of paying the damages in money in case of loss, the insurers may elect to rebuild on giving the notice stipulated in such contract, and a loss occurs, and the insurers elect to rebuild, and give the stipulated notice to the insured:
12. *Held*, That the election to rebuild converted the contract of insurance into a building contract (*Morrell agt. Irving Ins. Co.* 33 N. Y. R. 429).
13. That where the premises were insured in two separate companies for distinct sums, and each contract of insurance contained the same stipulations on the subject of electing to rebuild &c., and both companies united in notifying the insured of their election to rebuild after the loss, the insured might maintain his action against the said companies, jointly or severally, for a breach of the contract to rebuild (*Id.*).
14. That where the insurers elected to rebuild, and partially performed their contract, but desisted therefrom before fully completing it, the rule of damage in an action brought by the insured for the non-performance of the building contract would be the amount it would take to complete the building by making it substantially like the one destroyed, independent of what had already been expended thereon (*Id.*).
15. That after the parties had, by their election, converted the contract of insurance into a building contract, the amount of the insurance named in the policy ceased to be a rule of damages (*Id.*).
16. In such case, the action being brought against one of the companies, the plaintiff is entitled to recover the full amount of his damages against such company, leaving it to seek contribution from the other company on its own motion (*Id.*).
17. New matter in defense of the action must be set up in the answer, to entitle the defendant to avail himself of it on the trial (*Id.*).
18. The assessment of a premium note is but the performance of a ministerial duty, and is therefore not final. The fact that an assessment has already been made, upon a premium note, which still remains unenforced, will not render a second assessment upon the note, embracing the former one, and designed to accomplish the same purpose, invalid; where no question arises as to the statute of limitations (*Sands agt. Sweet*, 44 Barb. 108).
19. H. obtained an insurance from the defendant upon property owned by him, the policy stating that the loss, if any, should be "payable to F., as collateral." H. was indebted to F., at the time: *Held*, that the agreement that F. should receive the money, in case of a loss by fire, was only collateral to, and dependent upon the original undertaking, that after a loss had occurred, and not before, the money should be paid over to F., and not an assignment of the policy before any loss (*Frink agt. The Hampden Insurance Co.* 45 Barb. 334).
20. *Held*, also, that F., to whom the loss was payable as appointee, could maintain an action upon the policy; and that it was not necessary for him to

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allege, in his complaint, that he had an insurable interest (*Id*).

21. *Held, further*, that the facts presented did not show an assignment before loss, to a party who had no interest in the property, within the principle of the cases, but a case where the relation of insurer and insured existed between the defendant and H., the owner of the property, until a loss had taken place, when F. as appointee of the insured, stepped in and claimed under the agreement that the insurer should pay the money to him (*Id*).

22. If, after an insurance is effected upon goods in a specified building, the insured rent a part of the building to other persons, who apply the same to purposes prohibited by the policy as being hazardous, or extra hazardous, this will avoid the policy, although the goods insured are not in that part of the building so let (*Appleby* agt. *The Firemen's Fund Insurance Co.* 45 Barb. 454).

23. Where an insurance is made upon goods in a specified building, generally, so as to cover goods in any part of it, the insured cannot escape the consequences of allowing a hazardous business to be carried on in any part of the building by tenants, by showing that he only occupied a part of the building, and not the whole, as described in the policy (*Id*).

24. Independent of any specific agreement between insurers and the insured, the ordinary currency of the country would be considered as the basis upon which the policies were issued, and upon which any settlement of losses incurred should be made, and profits realized. But where there is a special contract that the premiums shall be paid in gold, and the losses be paid in the same currency, the company on declaring its dividends should allow the holders of such policies a certificate for their share of the profits in accordance with a gold standard, as compared with currency (*Luling* agt. *The Atlantic Mutual Ins. Co.* 45 Barb. 510).

25. In such a case, a notice issued by the insurers, to the effect that dealers making insurances payable in gold are to participate with others in the earnings, and that they will be computed and made payable in currency, will not affect the legal bearing of the contract, or alter the legal intendment arising from it. And the delivery to, and the acceptance by, the insured of certificates of earnings issued by the company in pursuance of such notice,

will not be a bar to an action by the policy holders, to compel a readjustment of the dividends, and to correct errors in the mode of computing and fixing the amount to which they are entitled (*Id*).

26. The policy holders are not bound to return such certificates, or run the hazard of being precluded from obtaining what they are legally entitled to (*Id*).

27. Where in a policy of insurance, the loss is made payable to a third person, who has no interest in the property insured, but claims the insurance as collateral security for liabilities incurred for the insured, prior to the insurance, he can, in case of loss, maintain an action for the insurance money, and recover in his own name (*Frink* agt. *The Hampden Insurance Co.* ante, 80).

28. Where papers containing preliminary proofs of loss by fire are served on and received by the insurance company, without objection, it is too late for the company on the trial, to object that these preliminary proofs were defective and insufficient; especially so where the loss, when it became payable, was refused to be paid on the ground alone that the risk had been increased (*Brown* agt. *The Kings County Fire Insurance Co.* ante, 508).

29. Where the defendants by their policy, insured the plaintiff against loss or damage by fire, on his stock of drugs, chemicals and other merchandise, "hazardous and extra hazardous:" *Held*, that the policy did not become void, nor the defendants non-lia-ble, by reason of the plaintiff placing to warm upon a stove upon the premises, about five gallons of an inflammable compound, called ointment, by reason of which the fire was occasioned (*Id*).

30. It is usual for druggists to mix various kinds of ointment, and to melt it on their stoves, as was done in this case; and the insurers must be deemed to be acquainted with the business, and to have included it in the risk (*Id*).

31. If the risk had not been increased within the spirit of the conditions so as to avoid the policy, then it is no defense that the plaintiff might have been more careful in the management of a business which the policy permitted him to carry on (*Id*).

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INTERNAL REVENUE.

1. Where the proportionable amount of the tax on gross receipts of a railroad company, imposed by the U. S. internal revenue law, which is allowed by the statute to be added to and collected with the fare of each passenger, is a fractional part of one cent: *Held*, that the company is limited to such fractional amount, and there being no coin in which it can be paid, the loss must fall on the company, and not on the passengers (*Black* agt. *Sixth Ave. R. R. Co.* 1 *Daly*, 536).

JUDGMENT.

1. An irregularity in the mode of entering up a judgment, is waived by an appeal from the judgment; and after an affirmance upon the appeal a motion to set aside the judgment for irregularity will not be entertained (*Mayor, &c.* agt. *Lyons*, 1 *Daly*, 296).
2. The defendants having lost the right to move to set aside the judgment, upon the ground of irregularity, the court permitted the plaintiff to amend the judgment by entering it up for the penalty, that other suitors, if any, might be enabled to have the amounts recovered by them levied under the judgment (*Id.*).
3. In an action against a constable's bond in the city of New York, where it has been adjudged that the answer was frivolous, it is erroneous to enter up a general judgment for the sum mentioned in the complaint. Judgment should be entered up for the penalty of the bond, and the court moved for an order, under the act of 1813, directing so much money to be levied upon the judgment as shall be sufficient to satisfy the debt or damages of the party aggrieved (*Mayor, &c.* agt. *Lyons*, 1 *Daly*, 296).
4. In such an action the summons should be for relief, under subdivision two of section 129 of the Code (*Id.*).
5. In an action against joint debtors or obligors where all are named as defendants a several judgment cannot be given (*Sage* agt. *Nichols*, 1 *Daly*, 1).
6. If, in equitable actions, all the questions in controversy between the parties have been determined upon the hearing, and what remains is merely the machinery set in motion by the court to carry its decision into effect, its decision is final. But if anything is left involving future litigation, the determination upon which might affect the ultimate adjustment of the rights of the parties, the decision, decree or order made, is merely interlocutory (*Smith* agt. *Lewis*, 1 *Daly*, 452).
7. *Held*, that a judgment obtained in a court of common pleas, in 1846, was not a suit or proceeding "pending" in that court on the first Monday of July, 1847, when the constitution of 1846 took effect, and did not, by the provisions of the 5th section of the 14th article thereof, become transferred into either the supreme or the county court. Yet it remained a valid judgment; and the legislature having by the judiciary act of 1847 provided that an execution to collect such a judgment might be issued out of the county court thereby organized, if it is necessary, in consequence of the lapse of time, to apply for leave to issue an execution, the county court is the tribunal to which the application should be made. The supreme court has no power to order an execution to be issued, in such a case (*Weyman* agt. *Childs*, 44 *Barb.* 403).
8. If a judgment has been set aside upon the ground of the insufficiency of the proofs made to the judge as the basis of an order for publication against the defendant as a non-resident, it is no longer of any validity, for any purpose, so as to protect any parties for acts done under it, except mere ministerial officers (*Welles* agt. *Thornton*, 45 *Barb.* 390).
9. Such a judgment will constitute no justification or protection to a person not a party to the suit, who delivers up to the receiver appointed therein, property which, as bailee, he is bound to keep for his bailor (*Id.*).
10. The affidavit verifying a statement of the indebtedness, on a confession of judgment, is substantially an allegation forming a part of the statement preceding it, stating that the matters before set forth are true; and being signed by the party making it, is a sufficient compliance with the requirements of the Code, in that respect (*Mosher* agt. *Heydrick*, 45 *Barb.* 549).
11. An allegation, in such an affidavit, "that the facts stated in the above confession are true," is in effect an averment that the statement is true, and it is therefore a sufficient verification (*Id.*).
12. Clerks of counties being classed among the judicial officers, an affidavit taken before a notary public may be used before any clerk; and under

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section 384 of the Code, a judgment on confession may be entered with any county clerk, and not merely in the county where the statement authorizing it was verified (*Id.*).

13. An adjudication in a former suit, is conclusive, as regards the rights of the parties, at the time; but if a defense to the claim, which they could not then have interposed, subsequently arises and accrues to the defendants, they should not be estopped by the judgment (*Smith* agt. *McCluskey*, 45 Barb. 610).

14. The legislature, in requiring the statement of facts accompanying a judgment by confession to be properly verified by the oath of the party, intended that in so far as it related to things within his own knowledge, he should affirm it to be true (*Ingram* agt. *Robbins*, 38 N. Y. R. 409).

15. Where the party only swears that he "believes the above statement of confession is true," the affidavit is insufficient, and the judgment, if entered thereupon, will be vacated (*Id.*).

16. To allow parties to adopt a form of words less binding upon their conscience than a direct affirmation, would weaken the safeguards which the law has provided, and therefore will not be allowed (*Id.*).

JUDGMENT DEBTOR.

1. An action by a judgment creditor to reach real estate conveyed to the wife of his judgment debtor, a part of the consideration for such conveyance being paid by the judgment debtor, who is alleged to be insolvent, cannot be sustained, where the presumption of fraud, which attaches by reason of the payment of such consideration, is overcome by the evidence (*Ackerman* agt. *Salmon*, ante, 259).

2. And evidence tending to show that the debt to the plaintiff was contracted by a partner of the judgment debtor, of which the latter was ignorant at the time he paid the consideration money, and that the plaintiff made no claim against him personally till after the conveyance to his wife, was properly admissible, to show the want of a fraudulent intent on the part of the defendants (*Id.*).

3. It is only in cases where a clear surplus will exist, after a reasonable sum has been appropriated to the support of the person for whose benefit a trust has been created, that courts of equity are authorized to interfere in

behalf of judgment creditors, and divert a portion of the income or annuity so dedicated, to the payment of the debts of such person (*Genet* agt. *Beekman*, ante, 286).

See CREDITOR'S ACTION.

JUDGMENT CREDITOR.

1. An action by a judgment creditor to reach real estate conveyed to the wife of his judgment debtor, a part of the consideration for such conveyance being paid by the judgment debtor, who is alleged to be insolvent, cannot be sustained, where the presumption of fraud, which attaches by reason of the payment of such consideration, is overcome by the evidence (*Ackerman* agt. *Salmon*, ante, 259).

2. And evidence tending to show that the debt to the plaintiff was contracted by a partner of the judgment debtor, of which the latter was ignorant at the time he paid the consideration money, and that the plaintiff made no claim against him personally till after the conveyance to his wife, was properly admissible, to show the want of a fraudulent intent on the part of the defendants (*Id.*).

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See CREDITOR'S ACTION.

JURISDICTION.

1. It is the right of the party affected, to assail an act of a public officer for want of jurisdiction; and he does not preclude himself from so doing by any agreement not to raise the question, even if founded on a sufficient consideration (*Grocers' National Bank* agt. *Clark*, ante, 115).

2. Appearing and participating in proceedings over which a court or officer has not jurisdiction, does not prevent a party from assailing them for want of it (*Id.*).

3. Where an officer has authority and jurisdiction to grant a discharge to an imprisoned, insolvent debtor, under the Revised Statutes (*Art. 5 ch. 5*,

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- tit. 1, part 2*), a plaintiff in an action against such debtor, has a right to object to the discharge of the defendant from arrest, upon or by reason of his claim unless it is a claim arising on contract (*Id.*).
4. The committee or guardian, residing out of the jurisdiction of the court, properly applied by petition for the appointment of a *guardian ad litem*, residing within its jurisdiction (*Rogers* agt. *McLean*, ante, 279).
 5. The courts of this state have no jurisdiction over lands in this state purchased by the United States, with the consent of, and ceded by the state, for the erection of post offices, custom houses, court rooms, forts, magazines, arsenals, dock yards and other needful buildings (*Dibble* agt. *Clapp*, ante, 420).
 6. Congress is vested with the same exclusive jurisdiction over such places as it possesses over the District of Columbia, and the same results follow. Consequently, the inhabitants of such places, actually dwelling therein, are not entitled to the exercise of the elective franchise at state elections, nor to the other political privileges exclusively belonging to the citizens of the state (*Id.*).
 7. Nor have the courts of this state jurisdiction of an action of ejectment to recover dower in such lands, where the land was purchased by the United States from the husband of the claimant, and ceded by the state, while he was living, and the right of dower of the wife was inchoate (*Id.*).
 8. *It seems*, that the act of the legislature of this state, giving the consent, and ceding the lands to the United States after such purchase, vested the fee of the whole premises in the United States, free from any claim of dower (*Id.*).
 9. The courts of New York have jurisdiction of actions for *torts* in regard to property, although they were committed out of the state, and although the parties were resident abroad, if the defendant is served with process here (*Latourette* agt. *Clarke*, 45 Barb. 827).
 10. So held in respect to an action brought by a citizen of Missouri against a citizen of Connecticut, for combining and conspiring with other citizens of the latter state to defraud the plaintiff by false representations as to the soundness of an insurance company (*CLERKE, J. dissented*). (*Id.*)
 11. The general term of the supreme court have jurisdiction of an appeal to the chancellor from the decision of a vice-chancellor, declaring the rights of the complainants, and referring the matters to a master for a proper accounting, which appeal was pending at the time the court of chancery was abolished by the constitution, &c., in 1846 (*Green* agt. *Givan*, 83 N. Y. R. 843).
- See DOWER.
- ### JURY.
1. The dimensions of a roof being known, and the number and character of the rain storms within a certain period being shown, the jury have data upon which they may determine the quantity of rain which was probably precipitated from the roof during that period. And a question to a witness as to the quantity of such rain is wholly scientific, and being put to a witness who was not shown to be familiar with the laws which govern the subject, was properly excluded (*Thomas* agt. *Kenyon*, 1 Daly, 132).
 2. Where a question stands doubtful upon an uncontroverted state of facts or where the facts will admit of either of two conclusions, the solution of the question should be left to the jury, and their determination is controlling and final (*Place* agt. *McIlvain*, 1 Daly, 266).
- ### JUSTICE'S COURTS.
1. Notwithstanding the defendant, in a suit before a justice of the peace, fails to appear at the trial, the plaintiff must establish his cause of action by legal evidence (*Armstrong* agt. *Smith*, 44 Barb. 120).
 2. It is well established that in order to reverse proceedings of a justice's court, proper objections must be there taken. Every reasonable intendment will be indulged in support of a judgment of that court (*Duntz* agt. *Duntz*, 44 Barb. 459).
 3. Where the plaintiff recovers judgment in the justice's court for \$100, and on appeal to the county court, serves an offer on the defendant to correct it, by taking \$25 less, which offer the defendant does not accept, the defendant cannot prove the offer in the county court for the purpose of substantiating his assertion to the jury, that the offer was evidence that the plaintiff had no confidence in his case (*Finney* agt. *Veeder*, ante, 14).

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4. Whether it was necessary to prove the offer in reference to the question of costs. *Dub. It seems*, that the offer might be used on the adjustment of costs, without being proved in the county court (*Id*).

5. In a justice's court, if inferences are to be indulged they must be in support of and not against its proceedings; and where a party seeks to reverse the judgment he must show affirmatively that error has been committed, and that he has been prejudiced thereby (*Martin agt. Houghton, ante, 82*).

6. It is well settled that a party may litigate a question of license in a justice's court (*Id*).

7. A justice of the peace in making a return to an appeal, acts ministerially. And he is liable for a false return to an appeal for any damages which a party to such appeal may sustain (*MacDonell agt. Buffum, ante, 154*).

8. Where competent evidence is offered on the trial, and rejected by the justice; and at the time the justice makes his return, or amended return on appeal, he recollects the fact, or by a proper effort to refresh his memory, he can bring the facts to his recollection; and if he intentionally omits or neglects to use such effort, with a design on his part to prevent a reversal of the judgment, and wholly neglects to return such fact, he is liable in an action of damages for a false return, to the whole amount of damages which the appellant may show he has sustained in consequence of such false return (*Id*).

9. The justice in such action cannot sustain his defense, that his ruling, rejecting the evidence, if actually made, was right under the pleadings; that such evidence was not receivable under a denial answer; that it was new matter, and should have been pleaded: where it is shown that the action tried before him was one for carelessly and negligently running against the plaintiff's wagon, and injuring it to his damage of \$50, the defendant's answer being a denial merely; and the evidence offered by the defendant and rejected by the justice, tended to show that the negligence on the part of the plaintiff contributed to the injury (*Id*).

10. This evidence should have been received under the denial answer, as it tended to prove that the plaintiff had no cause of action; consequently it

was not necessary to set it up and plead it as new matter (*Id*).

See NOTICE OF APPEAL.

See SUMMONS, 1. 2.

JUSTICES OF THE PEACE.

1. A justice of the peace has power to amend a summons, by correcting the year named in it, after the parties have appeared in the cause, where no objection is taken to the summons, and no motion is made to quash the proceedings on account of the error (*Bradbury agt. Van Nostrand, 45 Barb. 194*).

LANDLORD AND TENANT.

1. The defendant leased to the plaintiff certain premises, with a clause therein as follows: "In case the said Civill shall sell the said premises at any time after the first two years, he shall pay to said Seaman fifty dollars, and allow him to gather the crops there sown or planted upon said premises, and Seaman to give it up to said Civill." After two years Civill sold the premises to Seaman, the plaintiff and lessee, and Seaman brought this action to recover the fifty dollars: *Held*, that he could not recover (*Seaman agt. Civill, ante, 52*).

2. The assignee of a lease reserving rent, is liable for rent only as long as he remains in the legal relation of assignee; and when he assigns to another, and the latter accepts the assignment, all further liability on the part of the former is at an end (*Siefke agt. Kock, ante, 383*).

3. The consent of the landlord or lessor, that the lessee may assign the lease to another, operates as a discharge thereafter of the covenant that the lease should not be assigned, without the lessor's consent (*Id*).

4. A conveyance in general terms, of a house, passes everything that belongs to the house with it, and whether a thing is parcel or not of the thing demised, is always matter of evidence (*Cary agt. Thompson, 1 Daly, 35*).

5. The plaintiff, by a sealed lease, rented to defendant two houses, describing them as Nos. 162 and 164 Seventh avenue: *Held*, that parol evidence was admissible to show that a certain rear yard or lot passed with the demise of the two houses (*Id*).

6. Where a lease contains a covenant for renewal upon a rent to be fixed by

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- arbitrators, and the covenant is silent as to the time when such arbitrators shall be appointed, the covenant will be construed to mean that they shall be appointed a reasonable time before the expiration of the lease (*Wells* agt. *De Leyer*, 1 Daly, 89).
7. A lessee, under such a covenant, having been notified that the lessor had appointed an arbitrator, and being required to appoint one on his own behalf, before the expiration of the lease, and having failed to do so, has, at the option of the lessor, waived his right to such renewal, and the landlord having given the lessee notice that he should require him to pay a rent of \$200—this was held a new letting from year to year, and not a renewal of the former lease (*Id.*).
8. An allegation in an answer to an action founded upon a lease, that the defendant made the contract of hiring, without knowledge that _____ had been previously or _____ brother, with the _____ at _____, who fraudulently, as _____ to deceive, had oppressed _____; and that having entered into the occupation of the premises, he and his family were so annoyed and insulted by lewd persons calling at all times during the day and evening to obtain entrance for improper purposes, that he could not quietly and peacefully enjoy the premises, and was thereby ousted therefrom by the wrongful act of the plaintiff. *Held*, on a motion for judgment on the pleadings, no defense to the action. Upon a demurrer, the landlord is not bound to disclose to a lessee the names to which the demised premises have been previously put, and in the absence of any express covenants in the lease, there can be none implied by which the lessor can be held as warranting the premises fit for the purposes for which they are rented. The landlord cannot be held liable for the conduct of strangers, and especially when relief might be had against them on application to the police, nor can the acts of strangers claiming under no title, produce an eviction (*Micks* agt. *Bowman*, 1 Daly, 59).
9. The covenant of quiet enjoyment expressed or implied in a lease, only goes to the extent of engaging that the landlord has a good title, and can give a free and unincumbered lease of the premises demised. The acts of strangers, not claiming under any title, cannot in any sense be regarded as a breach of such covenant on the part of the lessor (*Id.*).
10. A lease executed by a married woman, containing covenants on her part to pay the rent, and expressing no intention to charge her separate estate thereafter, is absolutely void, and constitutes no bar to an action against the husband for use and occupation (*Pherson* agt. *Buhler*, 1 Daly, 168).
11. A tenant from month to month, is under no obligation to make substantial repairs (*Johnson* agt. *Dixon*, 1 Daly, 178).
12. The lessor is bound to make such repairs as are necessary to make the premises secure and safe for the purposes for which they are rented; and if its insecurity is known to him, it is negligence not to do so. The rule that the tenant takes premises at his own risk (*tenant's employer*), does not apply where the premises become dangerous or uninhabitable by the wrongful act or default of the landlord (*Id.*).
13. Where a stall was leased for the purpose of keeping a horse, and the tenant informed the landlord of a defect in the floor, and the landlord gave an explanation of it, and said he would attend to it, and, through relying on such explanation and promise, in consequence of the insecurity of the floor, the horse was injured: *Held*, that this was negligence on the part of the landlord, and that the tenant might recover damages for such injury (*Id.*).
14. Where a tenant remains in possession after the expiration of his term, upon the assurance of the landlord that he will give him a lease for ten years at a stipulated rent, and quits the premises upon the landlord's refusing to do so, there is no implied agreement for the payment of rent during the period of occupation. There must be some act of the parties from which the law implies an agreement to occupy for a year, to create a yearly tenancy, and unless such acts can be shown, the law will not make a contract for them (*Green* agt. *Smith*, 1 Daly, 107).
15. The occupant paid rent for the first quarter at the rate to be fixed by the promised lease, and left before the expiration of next quarter, upon the landlord putting up a bill announcing that the premises were to let, and on his refusal to execute and deliver the lease. *Held*, the occupant was not bound to pay rent for the portion of the quarter which he had occupied. There was not in such a case, that holding over which will create a ten-

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- ancy from year to year, or that agreement for occupation which would be valid by statute until the first of May following, or which would entitle the landlord, under the statute, to a reasonable satisfaction for use and occupation. Although such parol agreement was void by the statute of frauds, the plaintiff is not entitled thereby to any advantage. The law will leave him to the consequences of an act, which, if injurious, he might have avoided (*Id.*).
16. The plaintiff was in possession of certain premises under a parol agreement with the owner that he should have a lease for five years after May first, following. The defendant having become the owner of the premises, the plaintiff agreed in writing to surrender possession of them to him on the first of October preceding said first day of May, on payment of \$850: *Held*, 1. That the parol agreement between plaintiff and first owner was valid, and gave the plaintiff a right of possession until the first day of May, thereafter. 2. That the plaintiff's agreement with the defendant was founded upon a sufficient consideration, and was valid; and the plaintiff having performed on his part, was entitled to compel a performance on the part of the defendant. To entitle plaintiff to recover the amount agreed to be paid on his surrender of possession, he was bound to show that he was ready and willing to surrender on the day agreed on, unless a strict compliance with the condition, on that day, was waived by the defendant; and if such were the fact, it rested with the plaintiff to show it. What facts will show a waiver of strict performance? *Query.* (*Bogert* agt. *Dean*, 1 *Daly*, 259.)
17. One who has acknowledged the right of another to premises, and made an agreement with him for the occupation thereof by himself as tenant, for a limited period, cannot dispute his landlord's title by setting up an outstanding title held by himself, of which the landlord had no notice (*The People, ex rel. Slover* agt. *Skinner*, 45 *Barb.* 56).
18. Summary proceedings under the statute, to recover the possession of land, cannot be sustained unless the conventional relation of landlord and tenant exists between the parties. The relation created by operation of law, merely, will not answer (*The People, ex rel. Hubbard* agt. *Annis*, 45 *Barb.* 804).
19. Where the defendant hired the re-lator to work for him one year on his farm, for the sum of \$270, and was to furnish him house room for himself and family, a garden, and pasture for a cow: *Held*, that this was not a demise of premises in the nature of a lease, creating the relation of landlord and tenant (*Id.*).
20. That the relation was simply that of employer and employee, or master and servant, and the house room, garden and pasture, were parts merely, of the contract for service, and operated as a portion of the consideration of that agreement (*Id.*).
21. A tenancy from year to year is ordinarily implied in favor of the owner, against one who enters under a parol demise for a term of years, void by the statute of frauds. But when the entry is under an agreement by the owner to execute a valid lease in writing for the term, and he afterwards, in bad faith, refuses to execute it, repudiates the relation of landlord and tenant, and within the year resumes dominion over the property, he is bound by his election, and has no remedy on an implied agreement for intermediate use and occupation (*Gretton* agt. *Smith*, 33 *N. Y. R.* 245).
22. A provision in a lease against sub-letting the demised property, without the consent of the lessor, does not apply to a mere change in the business firm of the lessees, incident to the admission of a new partner or the withdrawal of an old one (*Roosevelt* agt. *Hopkins*, 33 *N. Y. Q.* 81).
23. Where the lessor proposed a provision against underletting the demised premises, or any part thereof, and the latter clause, on the objection of the lessees, was erased before execution, *held*, that the undertaking of part of the premises was not a breach of the agreement. the lessees continuing in possession of the residue (*Id.*).
24. A lease of a public wharf from the mayor, &c., of New York, does not confer upon the lessee the exclusive right to its possession, use or control. By the force of the lease, he only becomes entitled to the wharfage accruing thereat (*Commissioners of Piers* agt. *Clark*, 33 *N. Y. R.* 251).
25. Under such lease, such wharf continues a public wharf, and all vessels resorting to it are subject to the general rules of law regulating the use of wharves, slips and piers, and the mooring and stationing of vessels. And the vessels of the lessees are subject to the same rules, &c., as other

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vessels at said wharf. Such lessee cannot lawfully place structures upon such pier for his own convenience, which shall materially incumber it, or interfere with its free use for purposes connected with navigation, by the general public (*Id*).

26. A firm acting as the common agent of several lines of vessels, causing such structures to be erected and maintained for their accommodation as such agents, though they charge the expense thereof to such vessels, or lines of vessels, are the actors in making such obstructions, and are liable therefor (*Id*).

27. The rule of law regarding a person holding over by consent, after the expiration of his term, as a tenant from year to year, is applicable only to leases of real estate (*Chamberlain* agt. *Pratt*, 33 N. Y. R. 47).

28. A tenancy from year to year is ordinarily implied in favor of the owner, against one who enters under a parol demise for a term of years, void by the statute of frauds (*Gretton* agt. *Smith*, 33 N. Y. R. 245).

29. But when the entry is under an agreement by the owner to execute a valid lease in writing for the term, and he afterwards, in bad faith, refuses to execute it, repudiates the relation of landlord and tenant, and within the year resumes dominion over the property, he is bound by his election, and has no remedy on an implied agreement for intermediate use and occupation (*Id*).

30. A mortgage on lands which the mortgagor had previously contracted to sell, passes only his actual interest; and one who acquires his title at a foreclosure sale, takes it subject to the equities of the vendee in possession (*Laverty* agt. *Moore*, 33 N. Y. R. 658).

31. A vendee who has fulfilled his contract of purchase, may obtain a decree for specific performance against parties, who, with notice of his equities, succeeded to the interest of the vendor (*Id*).

32. A defendant cannot defeat a recovery, by setting up an outstanding right in a third party, who acquiesces in the title of the plaintiff (*Id*).

33. A conveyance, under a decree of foreclosure, of premises not embraced in the sale, does not pass the title, though the premises were embraced in the decree (*Id*).

34. A manifest mistake in a decree, by words of misdescription, when the premises are otherwise sufficiently identified and described on the face of a decree, does not prejudice the rights of the parties, the words of misdescription being mere surplusage (*Id*).

35. A lessor who has consented to a change of tenancy, and has permitted a change of occupation, and received rent from the new tenants, cannot afterwards charge the original tenants for rents accrued during the occupation of the new tenants (*Page* agt. *Ellsworth*, 44 Barb. 626).

LEGACY.

1. Where there is no provision in a will specifying the time when a legacy shall be paid, it is payable one year from the time of granting letters testamentary or administration (*Campbell* agt. *Cowdrey*, ante, 172).

2. But the legatee, in such case, has a right to the interest on the legacy after one year from the death of the testator or intestate. The old rule in equity is still in force governing the payment of interest in such cases (*Id*).

LEGATEES.

1. Where the executrix of the estate of N. E. received as collateral security the assignment of a mortgage held in trust, for the payment of a personal debt of the trustee due to the estate, for which assignment there was no legal consideration, and the executrix collected the moneys due on such mortgage, and distributed the same among the next of kin and legatees of said estate, in an action brought by the *cestui que trusts* against such next of kin and legatees, to recover the moneys thus distributed to them as proceeds of said mortgage: Held, that such next of kin and legatees were liable therefor (*Green* agt. *Givan*, 33 N. Y. R. 848).

2. That the rights of the parties were not altered by the fact that the defendants received, at the same time, other moneys than those arising out of such mortgage (*Id*).

3. That receiving the plaintiff's money without giving value for it, they are liable therefor, though mixed with other money belonging to them at the time of receiving it (*Id*).

4. The answer of the executrix admitting the receipt of the money upon

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such mortgage and thus distributed, is admissible, and binding upon the defendants made parties after her death by bill of revivor and supplement (*Id.*).

LEGISLATURE.

1. It is competent for the legislature to dispose of the interests of infants and of persons not *in esse*, and to declare that a deed executed by a portion of the trustees named in a will, shall be sufficient to convey the entire estate (*Matter of the Petition of Bull*, 45 Barb. 334).
2. The legislature has no power, where a claim is made by individuals upon a municipal corporation for damages, on account of the failure of the corporation to award a contract to them, to direct that the damages the claimants have sustained, shall be ascertained by arbitrators to be appointed as prescribed in the act, without requiring the assent of the corporation, instead of a trial by jury. (*WELLES, J. dissented.*) (*Baldwin agt. Mayor, &c. of New York*, 45 Barb. 359).
3. The legislature has no power to prescribe to any citizen the amount of money which he shall pay for a substitute to represent him in the national army (*Powers agt. Shepard*, 45 Barb. 524).
4. Where a bill has passed both branches of the legislature, and has been signed by the appropriate officers, and sent to the governor for his approval and signature, it has passed beyond the control of either house, and cannot be recalled except by the joint action of the two houses (*People agt. Devlin*, 33 N. Y. R. 269).
5. Where a bill thus passed by the two houses, signed by the speakers, and sent to the governor for his signature, is recalled by the action of one house alone, and the governor complies with the request, and sends back the bill, any action which such house may have in respect thereto, is a nullity. Such bill, as passed by the joint action of the two houses, signed by their speakers, approved by the governor, and deposited in the office of the secretary of state, becomes the law of the state, notwithstanding any action either house may take in respect thereto (*Id.*).
6. *It seems*, that the courts cannot, for the purpose of impeaching a statute go behind the records to inquire into

the regularity of the proceedings of the legislature in passing such act (*Id.*).

LESSOR AND LESSEE.

1. The defendant leased to the plaintiff certain premises, with a clause therein as follows: "In case the said Civill shall sell the said premises at any time after the first two years, he shall pay to said Seaman fifty dollars, and allow him to gather the crops there sown or planted upon said premises, and Seaman to give it up to said Civill." After two years, Civill sold the premises to Seaman, the plaintiff and lessee, and Seaman brought this action to recover the fifty dollars: *Held*, that he could not recover (*Seaman agt. Civill, ante*, 52).
2. Whether verbal leases and contracts are void on the ground that the act of congress directs a revenue stamp to be affixed to all leases and contracts. *Quere?* (*Fleming agt. Cherry, ante*, 96.)
3. The assignee of a lease reserving rent, is liable for rent only as long as he remains in the legal relation of assignee; and when he assigns to another, and the latter accepts the assignment, all further liability on the part of the former is at an end (*Siefke agt. Koch, ante*, 383).
4. The consent of the landlord or lessor, that the lessee may assign the lease to another, operates as a discharge thereafter of the covenant that the lease should not be assigned, without the lessor's consent (*Id.*).

LEX LOCI CONTRACTUS.

1. Where a contract is made in another state, between parties subject to the laws of that state, in pursuance of which one of them draws a bill of exchange, in favor of the other, upon a person residing in the state of New York, the parties will be considered as contracting according to the laws of the former state, and the bill will not be usurious, unless rendered so by the laws of that state (*The Bank of the State of Georgia agt. Lowin*, 45 Barb. 340).

LICENSE.

1. To constitute a license which will amount to a defense to an action of trespass, there must be a permission to enter upon the premises, which may be express, or implied from cir-

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circumstances (*Martin* agt. *Houghton*, 45 Barb. 256).

2. Where the defendant had been in the habit, for thirty years, of visiting the house of the plaintiff, and crossing his grounds without objection, the families being upon intimate terms: *Held*, that these facts would justify the jury in finding an implied license (*Id.*).
3. In a justice's court, if inferences are to be indulged they must be in support of and not against its proceedings; and where a party seeks to reverse the judgment he must show affirmatively that error has been committed, and that he has been prejudiced thereby (*Martin* agt. *Houghton*, *ante*, 62).
4. It is well settled that a party may litigate a question of license in a justice's court (*Id.*).
5. To constitute a license which amounts to a defense to an action of trespass, there must be a permission to enter upon the premises, which may be express or implied from circumstances; and it has been held, that familiar intimacy between families may be evidence from which a general license for such purpose may be presumed (*Id.*).
6. Where
had been
visiting
familiar
intimate
justified
to the
family.
the jury
did not enter upon the premises in violation of the permission of the plaintiff after she was forbidden by him (*Id.*)
or thirty years
of frequently
the family—the
being upon in-
the jury were
implied license
the plaintiff's
license justified
the defendant

LIQUORS.

1. In order to warrant a conviction of a licensed tavern keeper under the act of 1867, chapter 638, for selling liquors at his bar, on Sunday, proof must be made of an intent, on the part of the defendant to violate the statute. Where the sale is not made by the defendant personally, or in his presence, the presumption of his innocence is not overcome by merely showing that the sale was made on his premises, by his bartender: unless the evidence also shows that the defendant in some manner participated in it, connived at it, or assented to it (*The People* agt. *Uter*, 44 Barb. 170).
2. The question whether he assented, is one of fact, and not of legal presump-

tion, and it belongs to the jury. If the court takes from the jury the question of guilty intent, the conviction will be reversed (*Id.*).

LONG ISLAND SOUND.

1. Long Island Sound has always been open as a part of the high seas, to the use of all nations, and the state has never attempted to restrict such use, or to exercise any control over it; and it is apparent from the boundaries of the counties adjoining it, that the state does not claim any jurisdiction over it. Jurisdiction over it was never acquired by treaty or grant (*Mahler* agt. *The Norwich and New York Transportation Co.* 45 Barb. 326).

MANDAMUS.

1. A mandamus will lie to the commissioner of jurors, to compel him to strike from the list of jurors the name of a person not liable to do jury duty (*The People* ex rel. *Livingston* agt. *Taylor*, 45 Barb. 129).
2. This court has authority to grant a mandamus directing a gas company to furnish gas to persons who, under the provisions of its charter, have a right to receive it, and who offer to comply with the general conditions on which the company supplies others (*The People* ex rel. *Kernady* agt. *The Manhattan Gas Light Co.* 45 Barb. 136).
3. On a motion for a mandamus to compel town railroad commissioners to subscribe to the capital stock of a railroad company, the defendants cannot go behind the affidavits filed by the commissioners, of the consent of a majority of the tax payers to the issuing of bonds by the town, and show by affidavit that such consent was upon the condition that one million of dollars of town subscriptions to the stock should be taken before the commissioners were authorized to subscribe, and that this condition had not been complied with (*The People* ex rel. *The Albany and Susquehanna Railroad Co.* agt. *Mitchell*, 45 Barb. 208).
4. On such a motion it is not material whether a condition of that kind was originally inserted in the consent, or whether it has been complied with (*Id.*).
5. The statute having made the affidavits of the giving of their consent, by the tax payers, proof of such consent,

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and thereby established a rule of evidence as to their effect, in order to get rid of them, and to destroy their effect, a proceeding must be specially instituted for that purpose (*Id.*).

6. They must stand as evidence, under the statute, until vacated or set aside, and cannot be assailed by affidavits, upon a motion for a mandamus (*Id.*).
7. An officer *de jure* of a municipal corporation cannot have a mandamus to compel the payment of his salary by the comptroller, where it has already been paid to another person *de facto* in possession of the office (*The People ex rel. Dennis* agt. *Brennan*, 45 Barb. 457).
8. The legislature having authorized and directed the mayor, aldermen and commonalty of the city of New York, to create a public fund or stock, for the erection of a public market, a mandamus will lie to compel the common council to issue the stock; the common council constituting the only agency or instrument by which the behest of the legislature can be obeyed; and a mandamus being the only possible method by which that body can be compelled to act (*The People ex rel. The Commissioners for the erection of a Public Market* agt. *The Common Council of New York*, 45 Barb. 473).
9. The law commits to the judgment of the contracting board the decision of the question, what bids are most advantageous to the state. Mandamus to compel them to accept a certain bid, &c., refused (*People &c.* agt. *Contracting Board*, 33 N. Y. R. 382).

MANUFACTURING CORPORATION.

1. Where it appears upon the face of a general assignment, that it was made by a manufacturing corporation in contemplation of insolvency, the instrument is void, though it provides for the ratable distribution of the proceeds among all the creditors (*Sibbell* agt. *Remsen*, 33 N. Y. R. 95).
2. Where the managing members of an embarrassed corporation unite in forming a new one under the general law, and then transfer to it the property of the former; and a judgment creditor of the former corporation issues an execution upon his judgment, and levies the same upon the property so transferred, and becomes himself the purchaser at the sale under such execution; and a judgment creditor of the latter corporation after-

wards levies his execution upon the same goods as the property of the latter corporation, in an action by the former judgment creditors against the latter, for taking such property, the question whether the latter corporation was formed by the acting members of the former, to hinder, delay and defraud their creditors, may be raised and submitted to the jury on proper evidence (*Booth* agt. *Bunce*, 33 N. Y. R. 139).

3. The question as to the fraudulent purpose of such second corporation, involved in such inquiry being submitted to the jury, their finding thereon is conclusive. When such second corporation has been formed by the acting members of the former one, and the property thereof has been transferred to the latter, to hinder, delay and defraud the creditors of the former, the property thus fraudulently transferred is still liable to be taken on execution as the property of the former corporation (*Id.*).
4. It seems, that though a corporation thus fraudulently created, is void as to the *bona fide* creditors of the former corporation, it may be treated as a valid corporation by the *bona fide* creditors of the latter (*Id.*).
5. In this action the equities of the plaintiff and the defendant were considered equal, but the plaintiff had the possession. Therefore, the maxim, *Qui prior in tempore, potior est in jure*, was applicable, and decided the case (*Id.*).

MARRIAGE.

1. It is well settled that marriage may be proved by evidence of acts of recognition, matrimonial cohabitation, general reputation, and declarations of the parties (*Christy* agt. *Clarke*, 45 Barb. 629).
2. When admissions in letters will furnish a sufficient ground for inferring the existence of married relations (*Id.*).
3. The circumstances that parties were known among their acquaintances as husband and wife; that the man's mother and brother knew of and recognized the relation, addressing the wife accordingly; and that the husband presented to his wife a locket, inscribed with his initials, "to his wife:" Held, abundant evidence to maintain the allegation of a marriage between the parties (*Id.*).
4. A married woman is a competent

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witness in behalf of her children, to prove the marriage between herself and her husband (*Id.*).

5. A marriage thus proved by the direct evidence of one of the parties thereto, and by the various classes of proof above mentioned, requires strong evidence to controvert it; especially when there is issue born of the parties between whom the marriage is alleged to have taken place (*Id.*).
6. A marriage ceremony, performed when the man is *in extremis*, helpless, surrounded by the wife and her friends, when he is apparently oblivious not only of a previous wife, but of his children also, can afford no presumption against a previous marriage (*Id.*).
7. The validity or invalidity of a marriage is to be determined by the *lex loci contractus*. Where a former marriage has been dissolved on account of the adultery of the husband, he cannot contract a valid second marriage during the life of the former wife (2 R. S. 139, § 5). *Smith* agt. *Woodworth*, 44 Barb. 198).

MARRIED WOMEN.

1. Under existing statutes, a married woman may manage her separate property through the agency of her husband, without subjecting it to the claims of his creditors. She is entitled to the profits of a mercantile business, conducted by the husband in her name, when the capital is furnished by her, and he has no interest but that of a mere agent (*Buckley* agt. *Welles*. 33 N. Y. R. 518).
2. The application of an indefinite portion of the income to the support of the husband, does not impair the title of the wife to her property. No interest in her separate estate is acquired, either by the husband or his creditors, through his voluntary services as her managing agent (*Id.*).
3. Where the wife conveys away a part of her real estate owned in her own right, and takes back in part payment of the consideration thereof bonds and mortgages of her grantee, which she afterwards sells and assigns by deed with a covenant of guaranty by herself and husband, that the money payable thereby is collectible; in an action on such covenant of guaranty against the husband and wife for breach of such covenant, *held*, that to enable the plaintiff to maintain this action and charge the unpaid balance upon the separate estate of the wife, he is bound to show, either that there was an intention to charge such separate estate in the contract of sale and guaranty by the wife, or that the consideration obtained upon the sale, &c., was for the direct benefit of her separate estate (*White* agt. *McNett*, 33 N. Y. R. 871).
4. An action by a judgment creditor to reach real estate conveyed to the wife of his judgment debtor, a part of the consideration for such conveyance being paid by the judgment debtor, who is alleged to be insolvent, cannot be sustained, where the presumption of fraud, which attaches by reason of the payment of such consideration, is overcome by the evidence (*Ackerman* agt. *Salmon*, ante, 259).
5. And evidence tending to show that the debt to the plaintiff was contracted by a partner of the judgment debtor, of which the latter was ignorant at the time he paid the consideration money, and that the plaintiff made no claim against him personally till after the conveyance to his wife, was properly admissible to show the want of a fraudulent intent on the part of the defendants (*Id.*).
6. A married woman who hires premises in her own name, has an interest therein within the meaning of *Laws of 1849, chap. 375, p. 528*, and may maintain an action for a trespass thereon in her own name (*Fox* agt. *Duff*, 1 Daly, 196).
7. In an action by a married woman to recover money paid by her, the question whether the money so paid was her separate property or not, is one of fact, which it is proper to submit to a jury (*Thomas* agt. *Wickman*, 1 Daly, 58).
8. Where a husband, who was married prior to the married woman's acts of 1848 and 1849, was indebted to his wife in the sum of \$1,000 for money arising from the sale of her separate real estate, which sum she had, previous to those acts, lent to him, he agreeing to keep it for her and treat it as her separate property, and repay it to her with interest: *Held*, that equity would hold him to be her trustee for that amount, and allow him to pay her the same, upon his becoming insolvent, in the same manner that he might pay any other creditor. But that to authorize him to prefer his wife, as a creditor, it was necessary that the money in his hands should be held and regarded, as between them, at and from the time of its receipt by

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him, as a loan from her; that he should be deemed to be in fact a debtor to her for the same; and that they should have constantly and intentionally treated the sum in his hands as her separate property. (J. C. SMITH, *J. dissented.*) *Woodworth* agt. *Sweet*, 44 Barb. 268).

9. *Held*, also, that the husband was not obliged to insist on his marital rights to his wife's personal property and choses in action; and that if he did not assert such rights, but expressly agreed with her not to do so, and acted upon this agreement, equity would allow him to pay her any money she might have temporarily lent him, under such circumstances (*Id.*).

10. Whenever a husband has received or borrowed the property of his wife under circumstances which in a court of equity would be regarded as creating a debt to her, from him, and as entitling her to be considered and treated as his creditor therefor, he will be allowed to pay such debt from his property, in the same manner and upon the same principles, on which he would be allowed to pay any other debt, to any other creditor: and a payment to her or a transfer of property to her, in consideration of such debt, will not be regarded as a gift, or a voluntary conveyance of property in fraud of his creditors (*McCartney* agt. *Welch*, 44 Barb. 271).

11. A married woman cannot sue her husband, in an action for an assault and battery (*Longendyke* agt. *Longendyke*, 44 Barb. 366).

12. It was the purpose of the legislature, by the married women's acts of 1848 and 1849, to confer new rights of property upon the wife separate from and independent of her husband, and to enlarge and render more fixed and certain those already existing (*Abbey* agt. *Deyo*, 44 Barb. 374).

13. By the existing statute law of this state a married woman may acquire the title to personal property by grant or purchase; and this purchase may be made in any of the ordinary modes known to the law, or to the course of business. It may be made by the payment of cash, for the property purchased, or she may buy on her own credit. And if a purchase be made by her, and the credit given to her, with the object of vesting the title in her, she will acquire thereby a title to the property in her own name and as her sole and separate property. So the purchase may be made by herself in person, or by her authorized agent;

and her husband may be that agent. And her trade or business, while it is carried on in her own name, or for her own benefit, may, like all other trades and business, be conducted by herself personally, or through the instrumentality of others (*Id.*).

14. The legislature having, by the second section of the act of 1860, authorized a married woman to carry on any trade or business, on her own account, when in section seven of that act, as amended in 1862 (*Laws of 1862. ch. 172*), it provided that she may sue in all matters having relation to her sole and separate property, it intended to authorize her to bring all actions necessary to protect her rights in carrying on such trade or business (*Badgley* agt. *Decker*, 44 Barb. 577).

MARINE COURT.

1. Judgment may be rendered against one defendant alone in the marine court, in cases embraced by section 136 of the Code, although that section does not apply to the marine court (*Ballard* agt. *Lockwood*, 1 Daly, 188).

2. The court may, at special term, dismiss an appeal from the general term of the marine court for irregularity. But if the proceedings are regular, the appeal must be heard at the general term, even upon a question of jurisdiction (*Williams* agt. *Tradesmen's Fire Ins. Co.* 1 Daly, 322).

3. The court will permit an amendment by which an appeal may be perfected, where notice of appeal has been served (*Id.*).

4. By section 354 of the Code, the notice of an appeal from the general term of the marine court must be served upon the respondent personally, and the undertaking for costs be executed by the appellant himself. But where it appears that the appeal was taken in good faith, and notice of the appeal was served upon the clerk of the court below, and upon the attorney who appeared for the respondent on the trial below: *Held*, that it was within the discretion of this court to allow the appellant to perfect his appeal, and amend his proceedings, by serving a notice of appeal upon the respondent personally, and executing a new undertaking (*Id.*).

5. It is the duty of a judge of the marine court presiding at a trial by a jury, to give judgment upon the verdict; and this judgment he cannot intermit or avoid by making an order for a new

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trial (*Williams* agt. *The Tradesmen's Fire Ins. Co.* 1 *Daly*, 437).

6. An appeal from such a judgment, when entered, brings up only questions of law, and the appellant cannot be heard upon the objection that the verdict was contrary, to evidence (*Id.*).
7. There is no provision of law allowing a single judge of the marine court to hear a motion for a new trial, or providing for an appeal in that court from an order either granting or denying such a motion (*Id.*).
8. The reversal of a judgment upon the ground that it is against the weight of evidence, and an order for a new trial by the general term of the marine court, constitute a final determination, from which an appeal may be taken to the common pleas (*Id.*).

MASTER AND SERVANT.

1. An employer is not liable to one of his agents or servants for the negligence of another of his agents or servants, unless he was at fault in the selection of the agent or in some other respect. In the prosecution of a general enterprise, the employer does not warrant to each person who engages in the enterprise the competency of every agent employed, and cannot be made responsible, unless it is shown that he was guilty of a want of care in the selection of the person through whose negligence the injury occurred; though it is otherwise upon grounds of public policy where the relation of master and servant or of principal and agent does not exist (*Treadwell* agt. *The Mayor, &c.* 1 *Daly*, 123).
2. A general agent or clerk employed to make sales of goods and require payment therefor, who obtains payment of false bills by fraud or deceit: *Held*, as acting within the scope of his employment, and his principal is liable for the amount thus obtained; especially where there is some evidence, however slight, that the agent paid the sum thus collected to his employer (*Adams* agt. *Cole*, 1 *Daly*, 147).
3. The powers exercised by the city corporation in reference to the fire department, are conferred and employed exclusively for the public benefit, and the corporation cannot be held liable as a master for the wrongful acts of firemen (*O'Meara* agt. *The Mayor, &c.* 1 *Daly*, 425).
4. In an action by a servant against his master to recover damages for an injury occasioned in the course of his

employment, by defective or unsuitable machinery, it must appear that the machinery was in fact defective, that the injury was occasioned by such defect, and that the defendant had notice of it. Where, in such an action, the plaintiff's own testimony is sufficient to justify a presumption that the accident was the result of the negligence of a fellow workman of the plaintiff, a judgment of dismissal will not be reversed on appeal (*Kuns* agt. *Stuart*, 1 *Daly*, 431).

5. Where a vessel was attached to a wharf by a line lying for most of its length beneath the water, and at such a distance from the wharf as to leave ample passage way between it and the wharf for vessels to pass to and fro, but no person was on deck to loosen the line, or warn vessels attempting to pass: *Held*, negligence, which rendered the owners liable for any damages resulting therefrom (*Annett* agt. *Foster*, 1 *Daly*, 502).
6. The relation of master and servant between the owner and master of a vessel, and the liability of the former, as owner, for negligence in its management, does not cease unless the owner has given up all control of the vessel and of her employment, and all immediate and direct interest in the freight earned by her. Hence, where the agreement between the owner and master of a vessel, was that the former should make contracts for, and receive the freight, and pay wharfage, and the master should receive a share of the freight money, and pay all other expenses, and be allowed to select the kind of employment for the vessel: *Held*, that this was not such a surrender of control as to make the master owner *pro hac vice*, or relieve the owner of liability for injuries arising from negligence in the management of the vessel. What acts will divest the owner of his responsibility for the management of a vessel—considered (*Id.*).

MECHANIC'S LIEN.

1. A contractor failed to complete his contract, and the owner was compelled to complete the building. In an action by a sub-contractor against the owner for work and materials, for which a lien had been filed: *Held*, that the defendant might prove on the trial what it had actually cost him to complete the building, for the purpose of showing that nothing was due to the contractor, and consequently, nothing due to the plaintiff, as sub-

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- contractor (*Smith* agt. *Ferris*, 1 *Daly*, 18).
2. In an action brought by a sub-contractor to enforce a lien claimed to have been acquired under the mechanic's lien law of 1851, it must appear by the complaint, 1. That labor and materials have been furnished in the erection of the building, in conformity with the contract made by the original contractor with the owner. 2. That within six months thereafter, a notice in writing, under the sixth section of the act, claiming a lien for work or materials thus furnished, was filed with the county clerk. 3. That at the time of filing the notice of lien, or subsequently a payment was due or has since become due from the owner to the contractor upon the original contract. 4. That the contracting owner had some interest in the property at the time the notice claiming the lien was filed (*Bailey* agt. *Johnson*, 1 *Daly*, 61).
 3. Where, in an action to enforce a mechanic's lien, the complaint fails in any of the foregoing requisites, a motion to dismiss at the trial is proper, and will be granted (*Id.*).
 4. A *bona fide* purchaser of the premises before the filing of notice of the lien, cannot be "chargeable" with such notice (*Id.*).
 5. Where a sub-contractor is prevented from performing the whole of his contract with the contractor by reason of the failure of the latter, and an assignment by him of the contract for the benefit of his creditors: *Held*, that he may acquire and enforce a lien for the value of his labor and materials performed and furnished up to the time when he was prevented. Although at the time the sub-contractor filed his lien there was nothing due to the contractor, yet the latter having made an assignment with the consent of the owner, who detained from the contract price the amount of the lien, and the sub-contractor having, under an agreement with the assignee, completed his work, as contemplated in by the original contract: *Held*, that the equities are with the sub-contractor, and a court of equity will apply the sum so detained in satisfaction of his lien (*Henderson* agt. *Sturgis*, 1 *Daly*, 836).
 6. Where, prior to the filing of a notice claiming a mechanic's lien by a sub-contractor, the contractor in good faith and for a full consideration, transferred to a purchaser the right which he might thereafter acquire to any payments under the contract: *Held*, that the purchaser succeeded to the rights of the contractor upon the contract, and that as against such purchaser, the sub-contractor, who knew, at the time of the making of his contract, of the existence of the assignment, acquired no lien (*Oates* agt. *Haley*, 1 *Daly*, 338).
 7. The only exception to the rule that the sub-contractor can acquire no lien, where at the time of filing the notice there is nothing due to the contractor, is the case of an assignment by the contractor of his property in trust for the benefit of his creditors. No lien attaches by the mere performance of work pursuant to the contract, but it is gained only by filing the notice prescribed by the statute, and until that notice is filed, the contractor, while acting in good faith, may deal with and dispose of the indebtedness which may accrue to him under the contract, as he may by law with any other maturing indebtedness (*Id.*).
 8. A minister plenipotentiary of a foreign power is not exempt from the application of the mechanic's lien law of this state, as to any house or building which is not used as a mansion for purposes connected with his representative character; and where exemption is claimed, it must appear by the proof that he is entitled to a suspension of the rule that the *lex rei sitæ* controls. Where, therefore, on a motion for an order to join issue on the merits, in a proceeding to foreclose a mechanic's lien, it does not appear that the building was erected by the defendant for his residence as such minister: *Held*, that the motion of joining of issue should be granted (*Byrne* agt. *Herran*, 1 *Daly*, 844).
 9. Where the notice of lien under the mechanic's lien law stated that the materials were furnished in pursuance of a written contract: *Held*, that extra materials which became necessary in consequence of defects in the specifications of the written contract, were covered by the notice (*McAuley* agt. *Mildrum*, 1 *Daly*, 396).
 10. A conveyance of premises by the owner and builder, made before the filing of the notice of a mechanic's lien, but which, by an instrument executed subsequently to such filing, is shown to have been intended only as a mortgage, does not prevent the lien from attaching upon the equitable interest of the owner at the date of such filing. A mechanic's lien upon a build-

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ing, covers only the materials and work employed on the building referred to in the notice (*Id.*).

11. Where under a single contract, the lienor had furnished materials to the owner equally for seven houses, and one of such houses had been conveyed away by the owner before the filing of the notice of such lien: *Held*, that the lien was valid as a lien upon the remaining six houses, only for their proportionate part of the whole claim (six-sevenths), although some payments had been made by the owner on general account (*Id.*).

METROPOLITAN POLICE.

1. Certain individuals, ambassadors from Japan, sent a sum of money to D., with a request that B. should distribute the same among the police force of New York and three other cities named; and the wish was expressed "that the same should be applied in consonance with your usages, in acknowledgment of the efficiency of those police officers in contributing so much to our comfort." The money was divided between the four cities named, and \$13,750 was appropriated to New York. That sum was paid over to the board of police, which body, instead of distributing the money among the police force, adopted a resolution that the donation of the Japanese embassy should constitute the Japanese merit fund, to be invested by the comptrollers of New York and Brooklyn, and the treasurer of the board; and that from the income there should be paid annually \$650, to be divided between one captain, two sergeants and five patrolmen, who during the year had best discharged their duty, in the proportions specified. The comptrollers declined to accept the duty, and the funds remained in the hands of the treasurer of the board. The plaintiff was a member of the police during the time the Japanese embassy was in the city, but had since resigned his office. He sued to recover his share of the fund: *Held*, 1. That when the board of police agreed to accept the fund from B., they did so under the obligation to dispose of it according to the wishes of the donors; and they had no authority to divert it from that purpose, and apply it to the formation of a merit fund for the whole body of the police that might thereafter exist. 2. That the plaintiff, while a member of the police, had no right to accept the present without the con-

sent of the board; and that no such right accrued by his resignation. 3. That the board of police, by accepting the fund, undertook to dispose of the same according to the terms of the donors, among those who composed the police force at that time; and that their reception of the money, warranted the presumption that they consented to such payment. 4. That the plaintiff was entitled to judgment, for his distributive share of the fund (*Peel agt. Board of Metropolitan Police*, 44 Barb. 91).

MISTAKE.

1. When parties have entered into a written contract it must be presumed to express their common intention, and to speak their actual agreement. But if it be clearly shown that such is not the case, and that such written contract is untrue, and misrepresents or misstates their real agreement and intentions, as made and understood by both parties, in some essential particular, then such contract is a mistaken one, and the mistake may be corrected in a court of equity (*Botsford agt. McLean*, 45 Barb. 478).
2. A mutual mistake which will afford a ground for relief from a contract, by reforming it, means a mistake reciprocal and common to both parties where each alike labors under the same misconception in respect to the terms of the written instrument (*Id.*).
3. Upon a sale of personal property the purchasers agreed to pay therefor the sum of \$6,000, viz: \$2,000 in cash, and the balance in four equal annual payments, *with interest*, for which they were to execute their four several promissory notes, for \$1,000 each, with interest payable in one, two, three and four years, and to secure the payment thereof by a chattel mortgage upon the property. The \$2,000 was paid down, and a chattel mortgage was executed, conditioned for the payment of the said notes. *with interest*. Four several promissory notes were also executed by the purchasers, for \$1,000 each, payable at the time agreed, but two of them were so drawn as not to bear interest. The vendor, seeing that two of the notes were on interest, assumed that the other two were also on interest, and accepted the same, believing that all were properly drawn. The purchasers, knowing that two of the notes were so drawn as not to bear interest, purposely abstained from calling the vendor's attention to the fact: *Held*, that this

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was a case where the contract as executed and evidenced in the written papers was not carried out according to the agreement as the same was understood by both parties; and that the error in the two notes presented a clear case of mistake on both sides, for which equity could afford relief (*Id.*).

4. And the purchasers having been trusted to draw the notes, and they procuring their attorney to draw them, and then executing and delivering the same to the vendor as the notes required by the contract, although aware that two of them did not bear interest: *Held*, that this was a clear case of fraud, for which the vendor was entitled to have the notes reformed (*Id.*).

MORTGAGE.

1. Where a mortgagee charges the mortgagor with the premium for an insurance on his life for three years, and includes the amount in the mortgage, as a part of the principal, he is bound to keep the policies alive; and if, in consequence of his neglect to pay the premiums, the policies become extinguished, he is himself liable as an insurer (*Boule* agt. *The Union Bank*, 45 Barb. 111).
2. If the mortgagee be a bank, and it is claimed that therefore it cannot be an insurer, for want of power, then it may be held liable for its negligence in not keeping the insurance in force (*Id.*).
3. In either case parties interested in the mortgaged premises are entitled to have the amount of the insurance credited on the bond, and the land exonerated to that extent (*Id.*).
4. Where a mortgage is executed upon leasehold property, by a tenant for life, the same is, upon the death of the mortgagor, payable out of his personal estate, if there be sufficient for that purpose. If there is no evidence to show that any such means existed, and there is no pretence that the payment was made, the mortgage will remain a valid security for the whole sum, and is binding on the property (*Sheldon* agt. *Ferris*, 45 Barb. 134).
5. When an individual unites in himself the title to such a mortgage, as assignee thereof, and the interest of a tenant for life, he assumes all the obligations and duties which the tenant for life was bound to perform (*Id.*).
6. And if he enters into an agreement to sell un-
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ant for life (*Id.*).
7. The holder of the life estate in the mortgaged premises is bound to pay, annually, the interest accruing on the mortgage, until the estate ceases (*Id.*).
8. The general rule is that a tenant for life of an equity of redemption is bound to keep down and pay the interest accruing on the bond and mortgage while the same are held by him, although he is under no obligation to pay off the principal (*Id.*).
9. The legislature, by the act of April 2, 1858, authorized all that portion of the old Erie canal lying west of the Owaseo outlet, in the village of Port Byron, &c., to be abandoned by the canal board; and directed such board to settle upon the damage to the mill property of B. & R. caused by such abandonment. The canal board, on the 29th of May, 1858, passed a resolution, declaring that the portion of the canal, above mentioned, was abandoned, and awarding to B. & R. the sum of \$5,000 in full for the damages to their mill property caused by such abandonment. *Held*, that the money so awarded was an equitable fund for the payment of the liens upon such mill property, and was a substitute for said property to pay the debts of B. & R. (*The Bank of Auburn* agt. *Roberts*, 45 Barb. 407).
10. Accordingly *held*, that the holders of a mortgage upon the mill property had a clear equitable lien upon the money so awarded, for the payment of the mortgage debt, after exhausting their legal lien upon the property (*Id.*).
11. And that such mortgagees had a right to follow a draft given for such damages by a canal commissioner on the auditor of the canal department, to B. & R., and the proceeds thereof, into the hands of parties who were not bona fide holders thereof, except as to a small part, but received the same from B. & R. in payment of an antecedent debt, and with notice of all the facts (*Id.*).

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12. It is a familiar and well settled rule of law that the assignment of the principal instrument carries with it all *collaterals* as incidents, though not named (*Wyman* agt. *Smead*, ante 1).

13. And where a mortgage is assigned and taken as collateral security to a contract to convey real estate, and the contract is assigned, the mortgage in fact belongs to the assignee of the contract, though not named in the assignment (*Id*).

14. Where such mortgage is assigned to subsequent assignees, neither the first nor last assignee can maintain an action to foreclose the mortgage where there has been no breach of the contract. The subsequent assignee of the mortgage, though a purchaser *bona fide*, and for a valuable consideration, stands in no better position than the first, although the assignments are absolute on their face, and express a full consideration (*Id*).

15. The assignee of a mortgage must ascertain at his peril as to any defenses that may exist against the mortgage, or he must rely upon the covenants of his vendor (*Id*).

16. A mortgage on lands which the mortgagor had previously contracted to sell, passes only his actual interest; and one who acquires his title at a foreclosure sale, takes it subject to the equities of the vendee in possession (*Lavery* agt. *Moore*, 88 N. Y. R. 658).

MORTGAGE FORECLOSURE.

1. A lien cannot attach, under a mortgage, for a larger sum than that actually loaned; and payment cannot be enforced by the mortgagees or their assignees, even as trustees for the original mortgagors, for the amount not actually advanced; although the latter have credited their grantees with the whole amount specified in the mortgage, on the purchase money (*Freeman* agt. *Auld*, 44 Barb. 14).

2. Where one purchases with actual notice of a prior unregistered mortgage upon the premises, the registry of his deed will be of no avail against such notice. One who has the superior legal title, by deed from the purchaser at a mortgage sale, and who is in possession, no attempt having been made to disturb him, cannot maintain an action to set aside a deed executed by the mortgagee, and to have the same declared void, on the ground that the

grantor was induced to execute it by fraud on the part of the grantee (*Buller* agt. *Viele*, 44 Barb. 166).

3. In such an action, a general allegation in the complaint, that the grantee procured the deed by "false and fraudulent representations and practices, and by undue and improper influences," is insufficient, without stating the nature of the alleged representations, &c (*Id*).

4. A provision in a bond and mortgage, that if default shall be made in the payment of interest on any day whereon the same is made payable, and the same shall remain unpaid and in arrear for the space of ten days, the principal, with all arrearages of interest thereon, shall, at the option of the mortgagee, become and be due and payable immediately thereafter, is legal and valid (*Rubens* agt. *Prindle*, 44 Barb. 386).

5. On the 26th of June, 1858, the plaintiff executed a bond and mortgage to H. for \$5,000, containing the above provision. On the 7th of August, 1858, the plaintiff sold and conveyed the mortgaged premises to P., subject to the mortgage; the conveyance containing a covenant on the part of P. to pay the money secured by the bond and mortgage, as the same should become due and payable. P. accepted the deed with this covenant, and went into possession. He neglected to pay an installment of interest, when it became due, and for more than ten days thereafter. In consequence of this neglect, H. determined his option by electing to regard the whole principal, with all arrearages of interest, as immediately due and payable, and commenced an action against the plaintiff to foreclose the mortgage, praying for a decree against him for any deficiency there might be: *Held*, that as between the plaintiff and P., the latter became, by operation of the conveyance to him of the mortgaged premises, and the covenant therein, the principal debtor to H., and the plaintiff sustained the relation of surety to P.; the land being the primary fund for the payment of the debt (*Id*).

6. In an action to foreclose a mortgage, brought by the assignee thereof, the defense set up was that the bond and mortgage were given to secure a loan of \$1,000 in money, and the price of certain watches, sold by the mortgagee to the mortgagor for \$3,000, and represented to be good gold watches, worth from \$100 to \$150 each, but

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which watches were not as represented, but were of base metal, and not worth in market over \$300; and that the mortgagor was thereby defrauded to the amount of \$2,700. The fraud was found by the court to have been proved. The plaintiff purchased the mortgage on the same day it was executed, at a discount of \$900, and took an assignment thereof, with knowledge that the mortgagor was largely in debt, and his real estate heavily incumbered, and that the consideration for the mortgage was, in part, a sale of watches: *Held*, that these facts were sufficient to awaken, and should have awakened the plaintiff's suspicions, and led him to further inquiry; and were enough to charge him with notice of the fraud (*Wilcox* agt. *Howell*, 44 Barb. 396).

7. The mortgagee also procured from the mortgagor a certificate, dated the same day with the bond and mortgage, in which the latter declared that the bond and mortgage were given for a good and valid consideration, to the full amount thereof, and were subject to no offset or defense whatever. This was given before the mortgagor had discovered the fraud practiced upon him, and in ignorance of the design of the mortgagee to sell and of the plaintiff to buy, the bond and mortgage, and without any intention thereby to induce the plaintiff, or any other person, to purchase them; and was executed upon the representations of the mortgagee that such certificate was a mere matter of form, and that he, the mortgagee, would not part with the securities, and would give the mortgagor further time to pay, should he need it. And it was found by the court, that the plaintiff did not rely upon the truth of the statements in such certificate, in purchasing the bond and mortgage: *Held*, that the certificate did not amount to an *estoppel* in favor of the plaintiff (*Id*).

8. On the 28th of November, 1848, F. became the purchaser of certain premises at a mortgage sale. On the 12th of December, 1848, he executed and delivered to H., the previous owner of the premises, a paper, by which he acknowledged the receipt of certain securities from H., and declared that such securities and their proceeds, should remain as collateral security for advances which might be made, or liabilities incurred by F. on the purchase of certain property of H., then advertised for sale, or which he had already incurred on the pur-

chase of the premises in question; and that whenever such advances were repaid, or such liabilities extinguished, he (F.) was to account to H. for such securities, or their proceeds: *Held*, that this paper was a *mortgage*, so far as the premises purchased were concerned, and that the legal relation between H. and F., was that of mortgagor and mortgagee (*Sahler* agt. *Signer*, 44 Barb. 606).

9. And S., having in August, 1852, after the death of H., purchased of F. his interest in the premises: *Held*, that he acquired only the same interest which F. had to wit: a redeemable, and not an absolute estate—the title of a mortgagee. And that having gone into possession, then or previously, under or with the consent of F., he was a mortgagee in possession (*Id*).

10. Where premises sold under a mortgage foreclosure, were bid off by F. in effect for and as the agent of H., the mortgagor, the latter being the real purchaser, and the title vesting in and belonging to him, and F. having an equitable mortgage upon the premises, for his advances, but not the legal title or beneficial ownership: *Held*, that H.'s estate in the premises was subject to sale under an order of the surrogate, made upon the application of creditors, and that the purchaser at such a sale became vested with such title as H. had in the premises (*Id*).

11. If a mortgage is recorded as such, it will be notice to the world of its existence; and nothing less than actual fraud or artifice, in denying or concealing its existence when inquired about or sought after, will estop the holder from setting it up afterwards. Where one is mortgagee of the entire premises, and at the same time a devisee of only an undivided half thereof, the mortgage will not in equity be merged, but will be upheld for his protection (*Id*).

12. A mortgagee in possession can never be dispossessed, in an action of ejectment, by the holder of the legal title. Being in possession, he is entitled to retain it, until his mortgage is satisfied out of the rents and profits, or otherwise. So one who has purchased the mortgagor's title, cannot dispossess a person standing in the shoes of the mortgagee, until his mortgage is satisfied (*Id*).

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MUNICIPAL CORPORATIONS.

1. Where municipal officers act without authority in contracting for the repair of the streets of the city, the city will not be liable for the work performed under such contract (*Donovan agt. Mayor, &c. New York, 33 N. Y. R. 291*).
2. Thus when the appropriations for repairing such streets had been exhausted, and no appropriation for such purpose existed at the time the work was performed, and the street commissioners had given no certificate as to the necessity of such work, and the common council of the city had not authorized it, the city would not be liable for work performed upon its streets, and material for the same provided, though performed under a contract with some of the municipal officers (*Id*).
3. When a lawful contract has been made with a municipal corporation, and it has been fulfilled by the creditor, he is entitled by implication of law to a reasonable compensation, in the absence of any specific agreement as to price or rate of payment (*Harlem Gas Light Co. agt. Mayor, &c. New York, 33 N. Y. R. 309*).
4. A contract for gas, to light the public buildings and streets of the city of New York, is within the authority of the municipal corporation (*Id*).
5. Where the agreement is for the use, by the city, of gas belonging to a manufacturer, who is in the enjoyment of a practical legislative monopoly, the case is not within the proviso of the city charter, which requires contracts for supplies, involving expenditures beyond \$250, to be made in writing with the lowest bidder, on an advertisement for sealed proposals. (1 Sess. Laws 1857, p. 886, § 38.) (*Id*).
6. A contract prescribing the rate of compensation for the use of gas during a particular year, is not in its nature an agreement running from year to year, and cannot be held to fix the measure of compensation for subsequent use (*Id*).
7. A corporation is not limited to the exercise of the powers specifically granted, but possesses, in addition, all such powers as are either necessarily incident to those specified, or essential to the purposes and objects of its corporate existence (*Le Couteulx agt. City of Buffalo, 33 N. Y. R. 333*).
8. The common council of the city of Buffalo have full and ample power to take and hold any property transferred to them for the use of common schools in said city (*Id*).
9. By the term "common schools," is to be understood such schools as are common or open to all, in a certain locality. (*Per DAVIES, J.*) (*Id*).
10. Prior to 1851, the defendant had power, under the laws of the state, to establish and maintain free schools within its limits and legally take and hold real estate for such purpose (*Id*).
11. The common council of the city of Albany, having once legally canvassed the votes returned for the election of mayor of said city, have exhausted their power over that subject, and cannot afterwards reverse their decision by making a different determination (*Hadley agt. Mayor of Albany, 33 N. Y. R. 603*).
12. Where the law has committed to the common council the duty of canvassing the returns, and determining the result of an election from them, and the council have performed that duty and made their determination, the question as to the effect of the returns made is not open for determination by a jury in an action in which the title of the officer to his office comes up collaterally (*Id*).
13. The provisions of the ordinance of the common council of the city of New York, passed December 31, 1858, requiring city railroad companies to pay a license fee of fifty dollars for each car run by them, or become liable to a penalty, &c., is not an exercise of the power of municipal regulation, reserved by the terms of the grant to those companies (*Id*).
14. A penalty cannot be imposed for non-compliance with an illegal action (*Mayor New York agt. Third Avenue Railroad Co. 33 N. Y. R. 42*).
15. Where one has been employed to do certain work for a municipal corporation, by an agent of the corporation ordinarily and apparently having power to employ laborers, and work has been done under such employment, the fact that an appropriation, required to be made in advance, has not in fact been made, or if made, that it has been expended, will not constitute a bar to a recovery for the work and labor (*Donovan agt. Mayor, &c. New York, 44 Barb. 180*).

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NATURALIZATION.

1. A man's residence is that place where his family dwells, or which he makes the chief seat of his affairs and interests (*Matter of Hawley*, 1 *Daly*, 551).
2. Before an alien can be naturalized, he must have resided in the United States for five years next preceding the time when he applies to be admitted a citizen. The repealing act of June 26, 1848, has not abrogated this provision (*Id.*).
3. An alien came to this country when he was of the age of thirteen, and resided here till he was twenty-three years of age, when he returned to Ireland, the place of his birth, and where his parents resided, for the purpose of seeing his father, who was ill, but remained there seven years, during which time he followed his calling as a mechanic: *Held*, he had lost his residence in this country, though he may have intended to return and live in this country, and so expressed himself to his friends when leaving, and had declared his intention to become a citizen in the manner required by law (*Id.*).
4. The residence of a seaman, if married, is the place where his family dwells, or if he has never been married, the place where his domicile was fixed when he first went to sea as a mariner (*Matter of Scott*, 1 *Daly*, 534).
5. S., an alien, came to this country with his parents when he was three years of age, and lived with them in the city of New York, until their death, when he shipped from the port of New York as a mariner, in an American vessel, and for seven years thereafter he was employed exclusively and continuously as a seaman in the merchant service of the United States: *Held*, that he was to be deemed a resident of the United States, and of the state of New York, during that time, and was entitled to be naturalized (*Id.*).

NAVIGABLE RIVERS.

1. The Mohawk river is a navigable stream; and the title to the bed of the river is in the people of the state. Riparian owners along the stream are not entitled to damages for any diversion or use of the waters of the Mohawk by the state. *It seems*, that the common law rules, determining what streams are navigable, are not applicable to this country (*People ex rel. Loomis agt. Canal Appraisers*, 88 *N. Y. R.* 481).

NEGLECTANCE.

1. In determining what would or would not be negligence on the part of a child six years of age, it is not to be understood that a child of that age is to be held to the same degree of caution, foresight and discretion, that would be exacted from an adult. If a child exercises the caution of one of its years, that is all that can be required of it. More would be impossible, and the law does not exact an impossibility (*Honeysberger agt. The Second Av. R. R. Co.* 1 *Daly*, 59).
2. A request to charge that it is negligence on the part of a parent to allow a child six years of age to go alone in the streets: *Held*, properly refused (*Id.*).
- 3.

...both the plaintiff and defendant, flowed into the plaintiff's lot, and frequently submerged the basement of his house, and washed away parts of its foundation: *Held*, 1. That although the defendant could not be held answerable for the effect produced by waters flowing over his ground towards the plaintiff's lot, in consequence of the natural formation of the soil; yet it appearing that the body of water on defendant's lot was

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- greatly increased by the lawful cutting off of the drain and culvert, and the filling in of adjacent sunken lots by their owners, obligations were imposed upon the defendant in respect to his own lot, which, but for other causes, would not have existed, and he was bound to adopt reasonable means to prevent the water from collecting and remaining on his premises.
2. The fact that the pitch of the plaintiff's roofs tended to augment the body of water which did the injury, does not deprive him of all right of action for the injury he sustained by reason of the defendant's erection (*Thomas* agt. *Kenyon*, 1 *Daly*, 132).
4. The mutual or co-operating negligence which deprives one party of any right of action against the other, is where the act which produced the injury would not have occurred but for the combined negligence of both (*Id*).
5. Where the effect of the negligence of one party is to produce injury to a certain extent in any event; that is, if its effect is to produce a certain amount of injury, even if the other party had been guilty of no negligence at all, then, though the negligence of the other party may have rendered the loss or injury greater than it would otherwise have been, still they are not the joint authors of all that has taken place; and it is possible to distinguish the amount of injury caused by the negligence of the one from the amount of injury caused by the negligence of the other. And in such a case, the jury have a right to discriminate, and to hold a defendant responsible for damages arising from causes with which the plaintiff had no agency (*Id*).
6. A railroad company having undertaken to lay down a rail track along a street which is a public road, are bound to lay it down properly, and to keep it in a proper condition thereafter. It is a question for the jury to determine whether they have done so or not (*Fash* agt. *Third Avenue R. Co.* 1 *Daly*, 148).
7. And where by the sinking of the pavement, a spike in the rail was left exposed, with which the plaintiff's carriage coming in contact, the plaintiff was thrown out and injured: *Held*, that the company was guilty of negligence, and the plaintiff might recover. It is wholly immaterial whether the projection of the spike resulted from the failure of the city corporation to repair the street in the locality of the accident. The injury to plaintiff resulted from the defendants permitting the spike to project: *Held*, therefore, that the judge properly refused to charge the jury that if the defect in the track was owing to the condition of the streets, or of the gutters alongside, the plaintiff could not recover. A refusal to charge the jury that if the rest of the avenue was open and fit for plaintiff's wagon, he could not recover for the defective condition in the pavement: *Held*, proper (*Id*).
8. A party in the actual possession of a city pier, is responsible in damages for injuries arising from its bad condition, irrespective of the question of ownership; and in suits for such damages, the possession of the defendant being shown, the question of title does not arise (*Canavan* agt. *Conklin*, 1 *Daly*, 509).
9. An agreement between A. and B., joint possessors of a pier, that B. should keep it in good repair, is no defense to an action against A. by a third party, to recover damages for an injury arising from its defective condition (*Id*).
10. The owners of a pier in the city of New York leased it to a third party, who agreed to keep it in as good repair as it then was, reserving to themselves a right to use and occupy as much of the pier as their business might require; and under this agreement continued to use the dock: *Held*, that this was a joint possession, rendering them jointly liable with their lessee, for the death of a horse, caused by the defective condition of the pier (*Id*).
11. An individual has a right to set fire to log heaps on his own premises; and if the wind rises and carries the flames to his neighbor's premises, and the buildings of the latter, with their contents, are destroyed, no action will lie, without proof of negligence on the part of the person kindling the fire (*Calkins* agt. *Barger*, 44 *Barb.* (424)).
12. The fact that the person kindling the fire left home on the day his neighbor's buildings were destroyed, without leaving any one to watch the fire, and was absent when the fire occurred, does not show negligence and carelessness on his part, so as to render him liable for the damage done. If he had no reason to apprehend a sudden change in the weather, and the rising of the wind, when he left

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home, he should not be held responsible for it; certainly not without some proof that his presence might have prevented the injury which happened (*Id.*).

18. While negligence is usually a question of fact for the jury; yet when the undisputed facts show that the defendant, in an action for negligence, is guiltless of all blame, the case resolves itself into a question of law, for the determination of the court, upon the evidence introduced (*Id.*).

NEW TRIAL.

1. Although a new trial will not be granted on evidence merely contradicting the testimony on which the verdict proceeded, discovered subsequent to the trial, yet where the facts on which the witnesses for the prevailing party founded themselves, are falsified by the affidavits produced on the motion, it affords a sufficient ground for ordering a new trial (*Wehrkamp* agt. *Willet*, 1 *Daly*, 4).
2. In an action by a married woman against the sheriff for taking certain personal property, claimed by her to be her separate estate, upon a judgment and execution against her husband: *Held*, that her testimony on the trial tending to show her ability to purchase the property claimed, with moneys of her own, and independent of her husband, was material to the issue. And where it is shown beyond dispute, by affidavit, on a motion for a new trial, that her testimony on that point was false: *Held*, sufficient ground for granting a new trial (*Id.*).

NEW YORK CITY.

1. For the purpose of an assessment for improvements, the corporation of the city of New York is owner of the public squares, and is to be assessed in the same manner as individual owners are assessed for their property (*Matter of Turfler*, 44 *Barb.* 46).
2. The common council of the city of New York has the power to assume the expense of paving any of the streets of the city, and to pay the same, in whole or in part, out of the city treasury, and to assess the balance, if any, upon the owners of property. The 175th section of the act of 1813 does not prevent such a course, on their part. While that act gives the common council the power to assess the whole expense on the owners of lots, yet if, for any reason, they

think the public should bear a portion of the expense, they have authority so to direct. The section referred to is not obligatory (*Id.*).

3. In an action against the corporation of the city of New York, to recover for work done and materials furnished in repairing the streets, an answer setting up that there was an appropriation made by an act of the legislature for repairing roads, &c., but that the same was exhausted, is insufficient, where it is not averred and does not appear, that the plaintiff's work was such as was covered by the appropriation (*Donovan* agt. *Mayor*, &c. of *New York*, 44 *Barb.* 180).
4. Where it does not appear, and is not averred, that any department employed the plaintiff, it is no defense to his claim for work to aver that no appropriation had been made, to cover the expense of such work, according to section 28 of the charter of 1857, which forbids the departments of the city government to incur expenses before an appropriation (*Id.*).
5. The common council of the city of New York has no power to authorize an extension of a city railroad, unless possibly where such extension is really necessary to the enjoyment of a previous valid grant (*The People* agt. *The Third Avenue Railroad Co.* 45 *Barb.* 63).
6. If it be claimed that such extension is a necessary incident to the principal subject of the grant, that is a question of fact, and the burden of proving it rests upon the railroad company (*Id.*).
7. By the act incorporating the New York and Harlem railroad company, passed April 25, 1832, the company was empowered to construct a single or double railroad or way from any point on the north bounds of Twenty-third street, in the city of New York, to any point on the Harlem river between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One Hundred and Twenty-fourth street and the north bounds of One Hundred and Twenty-ninth street: *Held*, 1. That the practical location of the railroad within the prescribed limits would exhaust the powers conferred, and prevent a subsequent change of location, except by consent of the legislature. 2. That the location of the tracks (if there were two) would have to be substantially upon the same route. That the permission to build a double track should be construed to mean two

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- tracks essentially upon the same location, for the purpose of enabling cars to run in opposite directions, and not two essentially different routes through different streets and avenues, such as would be occupied by parallel railroads; especially as the right of granting to other persons or corporations authority to construct parallel railroads on streets or avenues not occupied by the New York and Harlem railroad company, was expressly reserved to the legislature by the 16th section of the same act (*The People agt. The New York and Harlem Railroad Co.* 45 Barb. 73).
8. By an amendatory act of the 6th of April, 1832, the company was "authorized and empowered, with the permission of the mayor, &c., of New York, to extend their railroad along the Fourth avenue to Fourteenth street, and through such other streets as the mayor, &c., might from time to time permit, subject to such prudential rules" as were prescribed by the act, and as the said mayor, &c., in common council convened, might prescribe: *Held*, that the precise route of the extension was not intended to be defined by the act, but this was designedly left to the sound discretion of the common council; and the road was to be extended through such other streets as the mayor, &c., might from time to time permit (*Id.*).
 9. That this was a continuous power, left to be exercised, from time to time, as the wants of the community should require. It was not therefore a power which was spent by a single grant or permission, but might be repeatedly exercised, according to the exigency of the case (*Id.*).
 10. *Held, also*, that the extension authorized by the act of April 6, 1832, was a longitudinal, and not a lateral one; and it was not meant that it should pursue the same precise direction with that portion of the road to which it was attached, and not in any degree diverging from such a course, but that it should have the same general direction, as a southern, south-eastern or south-western direction, and not a direction to opposite or widely divergent points of the compass (*Id.*).
 11. *Held, further*, that a reasonable interpretation of the act required that the extension should be made from the termination of the road already constructed, so as to be a legitimate continuation and prolongation thereof. That it was to go further—not to return back. It was to be continued, not to branch off. It was to be a single route, not several routes. It was to be an extension, and not a branch (*Id.*).
 12. Accordingly, the common council of New York having professedly in pursuance of the authority, given by the act of April, 1832, passed an ordinance on the 21st of April, 1863, granting permission to the New York and Harlem railroad company to extend its railroad, and construct a double track from their present Fourth avenue track, between Seventeenth and Fifteenth streets, through Broadway, to the foot of Whitehall street, with an additional track around Bowling Green and State street, and another additional single track around Union Square; with further permission to construct an additional single track to the Fulton ferry, through John street, &c., returning through Fulton street; and to extend its railroad and construct a double track from the present track in Fourth avenue, through Twenty-third street to Madison avenue, and thence through Madison avenue as far as it is or hereafter may be opened; with further permission to connect therewith by a single or double track from Fourth avenue to Madison avenue, through Twenty-fourth street: *Held*, that the permission attempted to be granted by the ordinance was not warranted by the terms, intent or fair interpretation of the act of the 6th of April, 1832 (*Id.*).
 13. *Held, also*, that the permission granted by the common council, to the railroad company was not maintainable as a lawful exercise of power granted to the common council under the ancient Dongan and Montgomery charters, independent of any statutory grant or authority (*Id.*).
 14. A contract by the street commissioner, without the authority of the common council, according to section 12 of the charter of 1853, for the construction of a stone wall along the sides of a street, to protect the embankment, is in contravention of the statute, if the whole work involves an expenditure of over \$250 (*Ellis agt. The Mayor, &c.* 1 Daly, 102).
 15. The fact that the wall thus built was in four detached pieces, at wide intervals apart, for each piece of which the expense was less than \$250, will not take the case out of the prohibition of section 12, it appearing that the wall was directed to be done at the same time, and was a continuous work. It must be regarded as falling within a single contract or direction of the

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- street commissioner, and is therefore within the prohibition (*Id.*).
16. The street commissioner, in order to protect a street embankment which was being built under his direction, ordered two basins to be built to carry the water from the surface of the street into the sewer: *Held*, that he had no authority to make any contract for the building of such basin, and the contractor therefore could not recover. The street commissioner has cognizance of only that part of the street improvements which consist in their opening, regulating and paving (*Charter of 1842, § 12*). The construction of basins connected with the sewers, and forming part of the means by which the underground drainage of the city is effected, is exclusively within the duties of the Croton Aqueduct Board (*Charter of 1849, § 15*). (*Id.*)
17. The street commissioner, though in some respects he may be regarded as the agent of the corporation, is not, however, such an agent as can bind his principal, generally. He is an independent public officer, acting under special statutory authority, but controlled by the corporation ordinances; and therefore like one acting under special instructions, from which he cannot depart, and of which parties dealing with him are presumed, and bound, to have knowledge. He cannot bind the corporation except in respect to those acts which fall within his limited duties and authority (*Id.*).
18. The harbor masters of the city of New York have full power to station and regulate vessels in the streams of the North and East rivers, and also within the wharves of the city of New York (*The Mayor, &c. agt. Tucker, 1 Daly, 107*).
19. The office of dock master, under the corporation ordinance of 1839, chapter 34, was superseded by the various acts of the legislature creating and regulating the office of harbor masters (*Id.*).
20. The act of 1853, "in relation to the police department of the city of New York" (*Laws of 1853, p. 441*), has been entirely abrogated by the metropolitan police act of 1857; and the provisions of section six of the former act, declaring the captains of police to be dock masters within their respective limits, do not therefore confer on captains of police any authority to act as such; nor have the police commissioners any power under the latter act to confer upon policemen any authority as dock masters (*Id.*).
21. The city inspector of the city of New York, being authorized by a resolution of the board of health to employ the plaintiff's assignor "to remove temporarily, or until further ordered by the board or common council, all the contents of the sinks and privies of the city beyond the harbor," made a contract accordingly, fixing the rate of compensation, as directed by the resolution, at fifty dollars per week for the first six months, and forty dollars per week for the time after that period: *Held*, that such contract was within the power conferred on the board of health by section 6 of the act of 1850, chapter 275, title 3, and section 27 of the act of 1857, chapter 446; and the corporation was chargeable with the expenses arising from the employment of the plaintiff's assignor (*Id.*).
22. *Held, further*, that it being competent, by the terms of the contract, for the defendants or the board of health to terminate it at any moment, it could not be deemed a continuing contract, or as invading the powers of the common council as prescribed by the charter, to make contracts for the same work: *Held, further*, that such contract was not in violation of section 36 of the charter of 1857, requiring all contracts involving an expenditure of over \$250 to be founded upon sealed bids and proposals (*Id.*).
23. *It seems*, that the provisions of section 38 of the charter of 1857 apply only to contracts to be let by authority of the common council, and were never intended to apply to the board of health. The courts have no power, in collateral proceedings, to inquire whether the facts upon which a board of health determines a thing to be a nuisance justify its conclusion (*McLaren agt. Mayor, &c. of New York, 1 Daly, 243*).
24. A dwelling house is one designed to be occupied as a place of abode by night as well as by day, and which is constructed with special reference to that object, and as long as it is capable of being so used in whole or in part, it retains its specific character (*Fire Department agt. Buhler, 1 Daly 391*).
25. A building erected for a store or a warehouse does not become a dwelling house, though a place may be fitted up in it for a person to sleep in; nor does one originally erected for a dwelling house cease to be such though a part of it has been converted into a store. A building, therefore, which was originally constructed as a dwelling house, and was occupied as such, though subsequently used in part as

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"a store," the attic being used by the clerks as a sleeping apartment, and in the basement of which there was a bedroom: *Held*, to be a "dwelling house," within the meaning of sections 14 and 20 of the fire laws of the city of New York (*Laws of 1849, ch. 84, p. 121*); the roof of which might be raised and made flat without subjecting the owner to the penalty prescribed in the statute (*Id.*).

26. The members of the fire department of the city of New York owe their allegiance to the city, not as members of a corporation, but as members of an organization identified with the administration of the city government, and forming a part of its protective police (*O'Meara agt. The Mayor, &c. 1 Daly, 425*).

NEXT OF KIN.

1. Where the executrix of the estate of N. E., received as collateral security the assignment of a mortgage held in trust, for the payment of a personal debt of the trustee due to the estate, for which assignment there was no legal consideration, and the executrix collected the moneys due on such mortgage, and distributed the same among the next of kin and legatees of said estate, and in an action brought by *cestui que trusts* against such next of kin and legatees, to recover the moneys thus distributed to them as proceeds of said mortgage: *Held*, that such next of kin and legatees were liable therefor (*Green agt. Givan, 83 N. Y. R. 842*).

2. That the rights of the parties were not altered by the fact that the defendant received at the same time, other moneys than those arising out of said mortgage. That receiving the plaintiff's money without giving value for it, they are liable therefor, though mixed with other money belonging to them at the time of receiving it (*Id.*).

3. The answer of the executrix admitting the receipt of the money upon such mortgage, and thus distributed, is admissible, and binding upon the defendants made parties after her death by bill of revivor and supplement (*Id.*).

NON-JOINDER.

1. But for defects arising from non-joinder of plaintiffs, advantage can only be taken, under the Code, by answer or demurrer. In case of such

defect, an answer upon the merits waives all objection on that account (*Donnell agt. Walsh, 83 N. Y. R. 43*).

NON-SUIT.

1. Where a cause, in which there are different counts or causes of action, is brought to trial, and evidence is given by the plaintiff affecting all the causes of action, at the close of which, the defendant moves for a non-suit as to one of the separate causes of action, the granting such non-suit and continuing the action as to the other causes, is of doubtful propriety (*Meyer agt. Goedel, ante, 456*).

2. It leaves all the evidence relating to that branch of the case before the jury; while the defendant, by the non-suit, may suppose the testimony on that subject immaterial, and omitted to contradict or explain it. He, however, has a remedy, by moving the court to strike out the testimony relating to that branch of the case (*Id.*).

3. If the defendant does not take this course, he cannot take a valid exception to the permission of the opposite counsel being allowed to comment on such testimony to the jury; as the evidence was properly taken in the case, and had not been stricken out; the fact of the declaration of the judge, that he did not consider this cause of action sustained, did not have the effect to remove the evidence from the case (*Id.*).

4. The refusal of the judge to open the case and admit evidence, after the summing up to the jury was through, is no proper ground of exception. Neither would the admission of evidence under such circumstances, be considered a good ground of exception. In both respects it is a matter of discretion with the judge (*Id.*).

NOTICE OF APPEAL.

1. Where the plaintiff recovers judgment in the justices courts for \$100, and on appeal to the county court, serves an offer on the defendant to correct it, by taking \$25 less, which offer the defendant does not accept, the defendant cannot prove the offer in the county court for the purpose of substantiating his assertion to the jury, that the offer was evidence that the plaintiff had no confidence in his case (*Finney agt. Veeder, ante, 14*).

2. Whether it was necessary to prove the offer in reference to the question

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- of costs? *Dub. R. seems*, that the offer might be used on the adjustment of costs, without being proved in the county court (*Id.*).
2. On an appeal from a judgment in a justice's court, under section 371 of the Code, the respondent must be responsible for the offer he makes to allow the judgment of the justice to be corrected, without regard to the extent the appellant claims in his notice of appeal it should have been more favorable to him (*Reed* agt. *Moore*, ante, 264).
3. The respondent's right to costs in the county court must depend upon the fact, if his offer be not accepted, whether the judgment of that court be more favorable to the appellant than such offer; and if more favorable to the appellant than the respondent's offer, the section is imperative, that the appellant will be entitled to costs; otherwise, he will be liable to the respondent for costs (*Id.*).
4. Consequently, the respondent is not confined in his offer to the claim of the appellant in the notice of appeal, even if that claim is particular and specific as to the amount; and this being so, it would be useless, and should, therefore, not be held necessary that the appellant's claim should be specific in amount (*Id.*).
5. The correct doctrine on this point is held in *Fox* agt. *Nellis* (25 How. 144), and *Loomis* agt. *Higbie* (39 How. 232), that it is not incumbent upon the ap-
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6. The legislature undoubtedly intended, in the language of the court in *Fox* agt. *Nellis*, to allow "each party to become an actor for the correction of errors, at his own peril of future expense, in case of further controversy" (*Id.*).
7. A notice of appeal from a justice's judgment, under section 371 of the Code, which specified the following grounds, was held insufficient to require an offer from the respondent, to wit: 1st. That the justice had not jurisdiction of the case, because the parties were tenants in common of the subject matter.
9. 2d. The justice erred in allowing plaintiff for hay, as the defendant furnished all the hay necessary to winter out the stock.
10. 3d. The damages were excessive.
11. 4th. There was no evidence to warrant a judgment for the plaintiff above \$5.
12. 5th. The justice erred in receiving in evidence the written contract.
13. 6th. The defendant demands a new trial, because the claim of each party in his pleadings was above \$50, and the judgment is above \$50.
14. 7th. That the case was without evidence to sustain a judgment for \$72.
15. A notice purporting to state the grounds of appeal, without intimation of further claim, does not require an offer from the respondent at his peril, even though some one or more of the grounds of appeal might be construed into a sufficient demand for a modification, had that purpose been pointed out. (*Porter*, J. *dissented*.) (*Love-land* agt. *Atwood*, ante, 487.)
- ### NUISANCE.
- See BOARD OF HEALTH, 1, 2, 3, 4, 5, 6.
- ### OCCUPANCY.
1. The practical location of a division line by adjoining proprietors, on the faith of which valuable improvements have been made, concludes them and their successors in interest (*Lacey* agt. *Moore*, 83 N. Y. R. 658).
2. The rights of riparian owners are usually controlled by the relative extent of water frontage; but these are subject, like other rights, to enlargement or abridgement by contract (*Id.*).
3. Mere occupancy of a lot under a claim of right, in virtue of a grant which does not embrace it, and made by parties who neither owned nor claimed it, is not enough to defeat a transfer of title on the ground of adverse possession at the date of the conveyance (*Id.*).

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OFFER OF JUDGMENT.

1. Where the plaintiff recovers judgment in the justice's court for \$100, and on appeal to the county court, serves an offer on the defendant to correct it, by taking \$25 less, which offer the defendant does not accept, the defendant cannot prove the offer in the county court for the purpose of substantiating his assertion to the jury, that the offer was evidence that the plaintiff had no confidence in his case (*Finney* agt. *Veeder*, ante 14).
2. Whether it was necessary to prove the offer in reference to the question of costs. *Dub.* It seems, that the offer might be used on the adjustment of costs, without being proved in the county court (*Id.*).
3. Where the defendant served an answer admitting two items in the complaint, and denied the balance of the complaint, and afterwards, on the same day, served an offer of judgment for \$1.01 more than the amount of the admitted items, which offer was not accepted, but the cause was put on the calendar for trial and referred, and on the trial the defendant amended her answer and set up two counter-claims, one for \$405.37, and the other for \$8.61, and on the trial the plaintiff defeated the counter-claim of \$405.37, and the defendant recovered upon the counter-claim of \$8.61, and interest thereon, which was deducted from the amount admitted by the answer, and the balance of \$87.37, reported as due the plaintiff March 22, 1886: *Held*, that the plaintiff had recovered "a more favorable judgment than the one offered," and was entitled to full costs under section 385 of the Code (*Turner* agt. *Honsinger*, ante, 66).

OFFICERS.

1. The authority of those who hold public offices under color of legal title cannot be disputed in a collateral proceeding. It can only be questioned in an action brought by the attorney general in the name of the people of the state. (*Code*, § 438.) (*The Mayor*, &c. agt. *Tucker*, 1 *Daly*, 107).
2. One who is appointed to a municipal office, but who is unlawfully excluded therefrom by a third person, who alone performs the duties of the office, cannot recover the compensation allowed by law for such services without at least showing that he has taken every proper legal measure to obtain possession of the office (*Smith* agt. *The Mayor*, &c. 1 *Daly*, 219).

PARTIES.

1. Where the consideration of a bond proceeds from a third party, who is acting in the name and for the benefit of the obligee thereof, such obligee is a party to the contract in such a sense as to be entitled to the proper remedies to reform or to collect the same (*Nevius* agt. *Dunlap*, 33 *N. Y. R.* 676).
2. To entitle a party to a decree of a court of equity reforming a written instrument, he must show first, a plain mistake, clearly made out by satisfactory proofs. He must also show that the part omitted or inserted in the instrument, was omitted or inserted contrary to the intent of both parties, and under a mutual mistake (*Id.*).
3. In an action against the owners of a vessel for supplies furnished her, where only one of the defendants is served, and it does not appear by the evidence that the other defendants are part owners: *Held*, that there was a clear misjoinder of parties defendant, which the defendant served was entitled to take advantage of at the trial, and his motion for a non-suit should have been granted (*Sager* agt. *Nichols*, 1 *Daly*, 1).
4. The plaintiff was arrested and imprisoned at the instance of the defendant L., on the charge of embezzlement. On the examination before the police justice, the plaintiff was discharged on the ground that the money alleged to have been embezzled by him was not the property of L. but of his wife. The defendant L. went for his wife, who appeared and made her complaint, and the plaintiff was detained until he procured bail: *Held*, in an action for the last arrest, that the wife being proved to have acted voluntarily, and without the coercion of her husband, the husband and wife were properly joined as parties defendant (*Cassin* agt. *Delaney*, 1 *Daly*, 224).
5. *Held*, further, that the damages arising from the first arrest, ought not to be blended with those of the second arrest, and the referee having evidently done so, the court, on appeal, will reduce the amount of the judgment, or reverse it (*Id.*).
6. A plaintiff cannot anticipate that a person, jointly liable with the defendant, would avail himself, if made a party to the suit, of the defense of the statute of limitations, and on that ground omit to make such person a party defendant. To justify the omission of a person as a party defendant

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in an action against a co-partner on a partnership obligation, it must appear by averments in the complaint, which lead to no other conclusion, that the legal obligation of such person had absolutely ceased (*Hyde* agt. *Van Valkenburgh*, 1 *Daly*, 416).

7. Where it appeared from the evidence that the plaintiff suing as Mary Cooper, was called Mary Flood, during her early infancy, but that she had been called Mary Cooper by C., with whom she lived, and whose name she took, and by all her acquaintances, since about the age of nine or ten years, a period of about twenty years: *Held*, that the action was properly brought by the plaintiff by the name of Mary Cooper; that being the name by which she was generally known (*Cooper* agt. *Burr*, 45 *Barb.* 9).
8. In an action brought against a railroad company to obtain an injunction restraining the extension of its road in the city of New York, and to annul and declare void an ordinance of the common council, granting permission to the company to extend its road, the city corporation is a necessary and proper party, *it seems*, where the common council, on granting such permission, has reserved to the city ten per cent of the gross receipts from travel on the portion of the road to be extended (*The People* agt. *The New York and Harlem Railroad Co.* 45 *Barb.* 78).
9. A testator, by his will, gave the income of certain lots to his daughter M., for life, and after her death to her issue; and in case of her death without issue, a part of the lots were to go to his son J., and another part to his daughter S., in fee. J. having died in the lifetime of M., leaving his property to minor children: *Held*, that such minor children were not necessary parties to a petition by M. for authority to the trustees under the will of the testator to sell the lots (*Matter of the Petition of Bull*, 45 *Barb.* 384).
10. In common law actions, the name of no person should be in or upon the record as a party, except such as must have judgment pass for or against them. (*Per E. D. SMITH, J.*) (*Porter* agt. *Mount*, 45 *Barb.* 422.)
11. An action to compel a mutual insurance company to readjust its dividends, and to correct an error it has committed in issuing certificates of earnings, may be brought by a portion of the stockholders on their own behalf and on behalf of other stockholders who are interested with them in the same question, and who may elect to come in and contribute to the expenses of the suit, and be bound by the judgment (*Luling* agt. *The Atlantic Mutual Ins. Co.* 45 *Barb.* 510).
12. Where it appears in the proceedings in a case that absent parties, who should have been made defendants, have by stipulation consented to be bound by the judgment, and relinquished all the title and claim to the subject matter of the action, the court is at liberty to go on, without their presence, to final judgment, as against the defendants named in the pleadings (*Cowing* agt. *Greene*, 45 *Barb.* 585).
13. A judgment debtor may come in and become bound by the decree, where the action seeks to reach property held in trust for him by others (*Id.*).
14. To compel the attendance and examination of a party under section 391 of the Code, a summons must be served upon the party to be examined, and the notice in writing prescribed by that section, must be served upon the attorney of such party, before the party can be brought into contempt. It is not necessary that such notice should be served upon the party personally (*Van Rensselaer* agt. *Tubbs*, *ante*, 193).

PARTITION.

1. The *general term* of the supreme court, have the power, *on appeal*, in an action for partition, to order the amendment of the petition of a committee or guardian of a non-resident infant lunatic defendant, sworn to in another state, and presented here for the purpose of the appointment of a guardian *ad litem* in the action, to the effect that such infant lunatic ward, was at the time of verifying his original petition, residing with the committee, the petitioner, or under his charge or custody (*Rogers* agt. *McLean*, *ante*, 279).
2. Also, ordering the amendment of the jurat or certificate of the judge attached thereto, stating the place where such petition was verified, and the affidavit taken: and, also, an amendment of the certificate of the clerk, so that it shall, in addition to its present contents, certify to the existence of the court, and the genuineness of the signature of the judge, which amendments when made, shall be deemed to be made and filed *nunc pro tunc* (*Id.*).
3. The committee or guardian, residing out of the jurisdiction of the court,

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properly applied by the appointment of a guardian reading within its jurisdiction.

4. On a motion for an order of sale of the purchaser at a sale suit to complete his purchase, the purchaser objected to the proceedings, in the ground that there was no service of the summons on the defendant. It appeared, an order was subsequently made resting the affidavit of filed *nunc pro tunc*: *Held*, the order was valid, and remanded. And that it would be sufficient, on this motion, shown affirmatively that was made (*Bogert* agt. *Barb.* 121).
5. The purchaser also objected that the guardian *ad litem* was appointed out of proof of service of the summons on the infant defendant; guardian did not furnish a bond, was not connected in the attorney of the plaintiff had no adverse interest that he was able to recover damages the infant might be negligent: *Held*, it was cured by an order of affidavit to be filed as (*Id.*).
6. There is no statutory provision requiring the guardian of a partition suit to put in an affidavit though it is advisable that should be filed, to protect the guardian, if he is ignorant of interest in the property (*Id.*).
7. Where he knows the right, and is willing to assume responsibility, there is no reason, why he may not be partitioned. At any rate, the answer does not affect the proceedings (*Id.*).
8. The want of proof of a summons on new parties added after the commencement of the suit, and the want of an answer or demurrer may be remedied by an affidavit showing that has been made (*Id.*).
9. All objections of the absence of irregularities not jurisdiction of the court be cured by an amendment of orders for that purpose: filed, the amendment is to be made in the paper (*Id.*).

PARTNERS AND PARTNERSHIP.

1. The parties to a copartnership may give it any name they please, and all contracts, obligations or notes made with, or given to such firm, may be prosecuted in the individual names of its members (*Crauford* agt. *Collins*, 45 *Barb.* 268).
2. Where a bank is a partnership, and was known to the bank was entered on the books of the bank that the bank was dissolved; and that an advertisement of dissolution in a newspaper was not sufficient (*Bank of the Commonwealth* agt. *Mudgett*, 45 *Barb.* 668).
3. A communion of loss as well as of profits is essential to the existence of a copartnership, and in a case where two parties were to share equally in the profits of an enterprise, but the expenses were to be borne wholly by one, and there could, in no event, be any risk of loss on the part of the other: *Held*, that they were not partners *inter se* (*Cummins* agt. *Mills*, 1 *Daly*, 520).
4. Where a note is made by one partner in the name of the firm for his own use, the firm are liable upon the note to one who discounts it, where usury is not established; unless the holder had notice that the proceeds were not to be used for the benefit of the firm (*The Mechanics' Bank of Williamsburgh* agt. *Foster*, 44 *Barb.* 87).
5. Where a balance is struck between copartners, and a promise to pay is given, an action of assumpsit may be maintained by the partner receiving the promise (*Kochler* agt. *Brown*, ante, 285).
6. Where a society was formed, the object of which was to form a common fund out of which to pay each member drafted into the United States army, a fair and equitable share of said funds, or furnish a substitute; and providing that in case no draft taken place, all moneys, less expenses, will be returned to each member: *Held*, that the members of the society were partners. That the object of the creation of the society ceased when it appeared that no draft was to take place (*Id.*).

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7. The defendant, as treasurer, had the funds of the society in his hands, and promised to pay to the members holding certificates the balance due to them, determined upon by all the members in proper communion. An action for money had and received was therefore properly brought against him by the plaintiff for a balance due him as a member of the society (*Id.*).

PAYMENT.

1. A creditor is entitled to apply money received by him to either or any of the separate debts due to him from the person making the payment. The acceptance of a bill or note made by a third person on a precedent debt, affords no presumption in favor of the debtor, but leaves the onus of proving that it was taken in absolute payment, upon him. But the acceptance of such a security suspends the creditor's right to sue upon his original claim, until the maturity of such security (*Smith* agt. *Applegate*, 1 *Daly*, 91).

2. In an action upon a promissory note held by the plaintiff as collateral security, where the defendant sets up in his answer the defense of payment, he may give in evidence any facts, which in law amounts to a satisfaction of said note, as against such plaintiff (*Farmers' & Citizens' Bank* agt. *Sherman*, 33 *N. Y. R.* 69).

3. Where such note, held as collateral security by the plaintiff, had been paid to the plaintiff by the payee thereof, by the delivery of lumber of sufficient value to satisfy the same, which lumber was delivered to, and accepted by the plaintiff, in pursuance of an agreement that the payee might withdraw any of the collaterals held by the plaintiff of lumber delivered designated such note: *Held*, that under the of the defendant might such agreement, and under it, and that w piece of payment was .

4. *Held*, also, that the note having been given for the accommodation of the payee, that such agreement and the transactions under the same, amounted to a payment of the note as between the maker and the payee of the same (*Id.*).

5. To establish the defense of payment of a pre-existing debt by a note of third persons, it is necessary for the defendant to prove that the note was

given to the creditor and received by him upon the express agreement that it should extinguish the previous debt (*Crane* agt. *McDonald*, 45 *Burr*, 354).

6. The burden of proof is on the defendant setting up such a defense. A finding by the referee that the goods sued for "were duly paid for by the defendants, by the delivery by the said defendants to said plaintiffs, and the acceptance by said plaintiffs of the note of M. & Co." is not sufficient to authorize the conclusion of payment (*Id.*).

PENALTY.

1. The provisions of the ordinances of the common council of the city of New York, passed December 31, 1886, requiring city railroad companies to pay a license fee of fifty dollars for each car run by them, or become liable to a penalty, &c., is not an exercise of the power of municipal regulation, reserved by the terms of the grant to those companies. A penalty cannot be imposed for non-compliance with an illegal exaction (*Mayor, &c.* agt. *Third Avenue R. R. Co.* 35 *N. Y. R.* 45).

PILOTS.

1. The "act concerning the pilots of the channel of the East river, commonly called Hell Gate," passed April 16th, 1847 (2 *Rev. Stat.* 544 ed. 425): *Held*, constitutional and valid (*Hillwell* agt. *Baynor*, 1 *Daly*, 47).

2. The clause in the federal constitution, conferring upon congress the power "to regulate commerce with foreign nations, and among the several states" (art. 1, § 8, subd. 3), does not deprive the several states of power to legislate upon the subject of pilots (*Id.*).

3. The statute (2 *Rev. Stat.* 544 ed. 455, § 57), requiring masters of certain vessels coming into the port of New York, to accept the services of a licensed pilot first offering his services, and imposing a penalty in case of refusal, cannot control or affect the master of a vessel prior to his arrival within the territorial jurisdiction of the state. A pilot, therefore, who spoke a vessel three hundred miles at sea, and tendered his services, which were refused, cannot recover pilotage fees under the statute authorizing such actions (*Patterson* agt. *Walsh*, 1 *Daly*, 183).

4. A right to recover the penalty given

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under the pilot act of 1853, as amended 1854, chapter 243 (2 *Rev. Stat.* 5th ed. 434, § 57), for the refusal of the master of a vessel to accept the services of the pilot first offering, is confined to those pilots who have been duly licensed, as in the act prescribed: *Held*, therefore, that a pilot not licensed by the board of commissioners of pilots, under the laws of this state, although licensed under the statute of the state of New Jersey, and authorized by the act of congress (*Dunlap's Laws U. S.* 924), to pilot vessels coming in or going out of the port of New York, cannot sue for the pilotage fees allowed by the pilot laws of this state, on the refusal of the master of a vessel to employ him (*Hopkins agt. Wykoff*, 1 *Daly*, 176).

PLANK ROAD.

1. The forcibly and fraudulently passing any toll gate on any turnpike or plank road in this state, is an offense by statute, involving a fixed pecuniary sum to the corporation whose franchise has been invaded. The corporation whose gate is forcibly and fraudulently passed, or whose franchise is invaded, is the corporation injured in the contemplation of the statute (*Monterey Plank Road agt. Chamberlain*, 33 *N. Y. R.* 46).

PLEDGE.

1. Where a loan was made payable on demand, and secured by a pledge of stock, with liberty to sell the same, in case of non-payment, and without notice: *Held*, that a notice without date or signature, left in the pledgor's office, stating that if a specified amount of the loan was not paid, the stock would be "used," did not constitute a demand, sufficient to authorize a sale (*Genet agt. Howland*, 45 *Barb.* 560).
2. In the absence of any agreement on the subject, a pledgee of stock cannot sell the same without notice of the time and place of sale; and in such case the sale must be public, at the time and place mentioned in the notice. But when the parties agree to have the pledge sold at public or private sale, without notice, the pledgor cannot insist that he should have notice (*Id.*).
3. Notice to redeem stock pledged, to avoid a sale, must give a reasonable time within which to pay the debt (*Id.*).

POSSESSION.

1. The law does not justify the owner of real or personal property, in taking possession of it, by his own act from another, unless he can do so without violence or a breach of the peace (*Corey agt. The People*, 45 *Barb.* 262).
2. The rightful owner of a house, having obtained possession thereof peaceably, and having the right to the possession, will be justified in using all necessary force to defend his possession (*Id.*).
3. And one who has rented the house as tenant of the owner, and acts under him in entering it, possesses the same right to use force in keeping possession that the owner has (*Id.*).
4. If the owner of a house, finding the same unoccupied as a dwelling, draws out the staple holding the lock that fastens the door, and enters the house he will be deemed to have entered peaceably, notwithstanding the former occupants, claiming title, may have continued to use it as a store house in which they kept grain, flour, salt, &c (*Id.*).
5. Individuals cannot obtain a right to the exclusive possession of islands in the sea by virtue of discovery, irrespective of the act of congress, passed in August, 1856 (*The American Guano Co. agt. The United States Guano Co.* 44 *Barb.* 23).
6. Islands newly discovered by its citizens belong to the United States; and until some exclusive rights are obtained in pursuance of the provisions of that statute, all the citizens of the United States possess equal rights to go there. But where the plaintiffs, while an island remained in an unoccupied condition, by their agents, went upon it and expended money in erecting works and making improvements, and mining guano, which they conveyed to the shore: *Held*, that they were entitled to be protected in the enjoyment of such property, and in the possession of the guano so mined (*Id.*).
7. One who acting upon information obtained from another, of the existence of a guano island discovered by the latter, takes the first actual possession thereof, cannot claim an exclusive title as discoverer, under the act of congress of August, 1856, even as against third persons (*Id.*).

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PRACTICE.

1. Whether or not a leading question may be put to a witness is a matter of discretion with the judge at the trial; and the allowance of a leading question has ceased to be considered a matter to be reviewed on appeal (*Black* agt. *The Camden and Amboy Railroad Co.* 45 Barb. 40).
2. Although affidavits of jurors will not be received to show their own misconduct, or the misconduct of their fellows, they are admissible to show the misconduct of a party, or of the officer having charge of them (*Thomas* agt. *Chapman*, 45 Barb. 98).
3. Affidavits of jurors, going to show that they agreed to the verdict only in consequence of the statements of the officers, *it seems*, are not admissible for that purpose; but it is not necessary for the party complaining of the verdict to show that it was in fact influenced by the statements of the officer (*Id.*).
4. It is sufficient for him to show that there is reason to suspect that the statements were made, and if made, that they were likely or calculated to influence the verdict (*Id.*).
5. Where the affidavits presented to a judge, on an application for an order of publication, tend to establish the requisite jurisdictional facts to authorize him to make the order, if he errs in his decision upon such evidence, and grants the order, it is a judicial error, which may be reviewed and rectified upon appeal, or on motion to set aside the order and proceedings, but cannot be questioned in a collateral proceeding (*Welles* agt. *Thorton*, 45 Barb. 390).
6. A mistake, or error of judgment or opinion, in passing upon the force and weight of such evidence, will not render the order or process issued void, but simply irregular and erroneous (*Id.*).
7. An action was brought against husband and wife, to recover an excess of interest beyond the legal rate, paid to them upon a loan. The complaint charged the defendants jointly with the receipt of the usurious excess, not stating that they were husband and wife. They were sued simply as joint debtors, and judgment was prayed against them jointly, and they defended separately, both denying the complaint. The jury found a verdict against the wife alone, not rendering any verdict for or against the husband: *Held*, that there was a *mistrial*, and that no judgment could be entered upon the verdict (*Porter* agt. *Mount*, 45 Barb. 422).
8. *Held*, also, that the plaintiff could not be permitted to amend his complaint by inserting in it the proper statements alleging that the defendants were husband and wife, so that the verdict might stand, retaining the husband's name in the record as husband, but without any judgment against him (*Id.*).
9. But that the plaintiff might be allowed to dismiss the complaint and discontinue the action against the husband, to the same effect as if a verdict had been found in his favor, and enter a judgment on the verdict against the wife, if the court were satisfied that justice required it, and that the verdict was just and fair and no valid exceptions were taken at the trial (*Id.*).
10. The judge, at the trial, may in all cases, in his discretion, with or without the consent of the parties, allow the jury to take to their room any written documents or papers received and used in evidence on the trial (*Id.*).
11. Though a tender be irregular, for the reason that the money is not brought into court, the admission in the answer, of the justice of the plaintiff's claim, is none the less distinct and unequivocal. An allegation in an answer that the defendant offered a certain sum as due to the plaintiff, however defective the answer may be in not setting up a legal or equitable defense, is an admission of the plaintiff's right to the sum offered; and entitles the plaintiff to an order, under section 244 of the Code, that the defendant pay it over to him (*Roosevelt* agt. *The New York and Harlem R. R. Co.* 45 Barb. 554).
12. The rule is the same where the admission of the plaintiff's claim is made by way of an *offer of judgment* (*Id.*).
13. Although in all cases of *counter-claim* an offer to pay a sum may not, and ought not, to be treated as an admission of the justice of the plaintiff's claim, so as to entitle him to an order for the payment of the sum named, yet where, in an action upon a bond given as collateral to a mortgage, the defendant set up a counter-claim, alleged a tender of a certain sum to the plaintiff, and prayed that the mortgage might be decreed to be satisfied by the plaintiff; it was *held* a proper case for an order, under section 244 of the Code, for the payment of the sum tendered (*Id.*).

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14. To entitle the defendant in such an action to a judgment that the plaintiff execute a satisfaction of the mortgage, it is necessary to pay or tender the amount due upon the bond. Payment is a condition precedent to the right to a satisfaction piece (*Id.*).

PRINCIPAL AND AGENT.

1. A carrier, in forwarding goods beyond the terminus of his own route, is bound by the instructions of the owner. It is his right and his duty, in an unforeseen exigency, when the safety of the goods requires it, and the consent of the owner may fairly be presumed, to deviate from the letter of his instructions, and notify him of such deviation; but when the deviation is unnecessary, and for the mere convenience of the carrier, he assumes the risk of consequent injury, and remains responsible as an insurer. The primary duty of an agent is to observe the instructions of his principal; and when he disregards them, he voluntarily assumes a responsibility by which he must be content to abide (*Johnson agt. New York C. R. R. Co.* 33 N. Y. Co. 610).
2. To ratify an unauthorized act performed by an agent, it is sufficient if the principal, with knowledge of what has been done by the agent, consents to be bound by it, and unequivocally manifests such intent to the other party (*Keeler agt. Salisbury*, 33 N. Y. R. 648).
3. *It seems*, a promise to pay a smaller sum than that which is due, to extinguish an existing debt, does not operate as an extinguishment of the same, even where the promise is reinforced by additional security from the debtor's own means. But where such promise is reinforced by the procurement of a third person to become surety for him, by engaging his personal credit, or pledging his property for the payment of the sum agreed, &c., it is a compromise operating by way of accord and satisfaction, to extinguish the original debt (*Id.*).
4. In general, a factor has a lien for his general balance on the property of his principal coming into his hands. A commission merchant advanced money to his principal on his indorsement and charged the note upon which the advance was made, in his general account: *Held*, that the mere charging of the note to the principal, did not entitle the latter to its possession. The agent had a right to retain it as his principal's property, until he was paid the balance of his general account arising in the course of their dealings (*Myer agt. Jacobs*, 1 *Daly*, 32).
5. The rule that an agent or trustee cannot confer upon another the right to discharge the trust or duty created by his appointment, applies only where the act to be done involves personal trust and confidence, and calls for the exercise of the agent's discretion or judgment; a mere ministerial or executive authority may be delegated by an agent to another (*Grinnell agt. Buchanan*, 1 *Daly*, 538).
6. Where A. agreed with B., that if within a fixed time B. should make an arrangement for the taking down of certain houses, he would pay B. a sum of money, which sum was to be paid as a bonus to the party taking down the houses, and the arrangement was made: *Held*, that the agency of B. to receive and pay over the money, was not one involving personal trust and confidence, and might be assigned: *Held, further*, that this arrangement having been made, and its stipulations performed by C., the amount to be paid by A. was simply a debt, on which a right of action remained in B. to be prosecuted for the benefit of C., and which might be assigned by A. to the party beneficially interested. The effect of *Considerant* agt. *Brisbane* (22 N. Y. R. 389), considered and discussed. (*Per DALY, F. J.*) (*Id.*)
7. The Code having abolished the distinction between actions at law and suits in equity, and left but one form of procedure, that form of procedure is to be preferred which is the most direct, consistent and comprehensive. Hence, where at common law the suit would have to be brought in the name of the trustee, for the benefit of the *câstui que trust*, while in equity it might be brought directly by the latter—the equitable form is to be preferred (*Id.*).
8. If goods sold to an agent have come to the use of his principal, the seller, upon discovering the principal, may require payment of him, although he instructed the agent not to purchase on credit, unless the principal can show that it would change the state of accounts between himself and his agent, to his prejudice. It would be otherwise, however, if the seller gives the credit exclusively to the agent, as when he hears of the existence of the principal, and yet debits the goods to the agent (*Rowan agt. Buttmann*, 1 *Daly*, 412).

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8. A principal should be held responsible for the acts of his agent, performed within the scope of the apparent authority which the principal allows him to assume (*Wilcock* agt. *Schuyler*, 44 Barb. 469).

10. Where one employs an agent to purchase goods for him, who makes the purchase in his own name, without disclosing the name of his principal, and delivers the property to his principal, and the latter, without further inquiry, pays the agent, who keeps the money, the vendor may recover the price of the goods of the principal (*Donnell* agt. *Briggs*, 45 Barb. 470).

11. If, in such a case the principal knows that his agent has purchased the goods from some one, he is bound to make inquiry and ascertain the name of the vendor; and before paying the price to his agent, he should ascertain whether the latter is also the agent of the vendor to receive the money (*Id.*).

12. A delivery of a trunk of clothing to the captain of the defendants' boat, renders the defendants, as common carriers, liable for its loss, although the captain was not the general agent of the defendants for receiving freight, &c., for transportation. The captain was acting within the scope of the apparent authority of agent, which the principals allowed him to assume (*Wilcock* agt. *Schuyler*, *ante*, 97).

PRESUMPTION.

1. The absence of a person for eight years, without being seen or heard of, warrants the presumption of his death; and if to this is added the proof of his frequent declarations of an intent to commit suicide, this presumption is strengthened, and will warrant the conclusion that his death occurred about the time of his disappearance (*Sheldon* agt. *Ferris*, 45 Barb. 124).

PRINCIPAL AND SURETY.

1. A surety is not discharged by reason of the neglect of the creditor to prosecute the principal debtor, when requested to do so, by the surety, if the principal was insolvent at the time, and unable to pay his debts, and continued so, ever afterwards (*Thompson* agt. *Hall*, 45 Barb. 214).

2. In an action against a surety, he cannot avail himself of the neglect of the creditor to prosecute the principal debtor under the provision of the Code

permitting equitable defenses to be made (*Id.*).

2. It is a general rule that mere indulgence, on the part of the creditor, and neglect to prosecute the principal, will not discharge the surety (*Id.*).

4. Objecting to a surety in a bond, for insufficiency, even though the objection is sustained, and another surety added, will not release the former, so long as his name is on the bond when it is finally accepted (*Orange* agt. *Collins*, 45 Barb. 399).

5. The defendants agreed with the plaintiff that P. should account to him for the proceeds of all paper sold and delivered to him by the plaintiff within one year, to be sold on commission, and that they would be liable to the extent of a balance of \$1,000. No time was specified, within which P. was to pay over the moneys. P. from time to time gave the plaintiff his notes, for different amounts, without reference to the quantity of paper furnished, or to any precise balance due, or to any settlement made, or to be made, between the plaintiff and him, but they were in the nature of advances u
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6. *Held*, also, that evidence of a usage or custom existing among men engaged in the business of selling paper on commission, to give notice to the manufacturer, before the paper is sold, to enable him to raise money thereon in anticipation of the sales, was proper; and that it was not liable to the objection that the effect of it was to vary the terms of the written contract. That it went to explain and ascertain the intention of the parties in relation to a matter upon which the contract was silent (*Id.*).

PROMISSORY NOTE.

1. In an action against bankers, to recover damages for omitting to present a note for payment, at maturity, and to charge the indorser, the judge left it to the jury to find so much damages

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- as they would consider such a claim to be worth against "such a man as the indorser was shown to be." *Held*, erroneous, and that the charge should have had reference to the promissory means of the indorser (*Bridge* agt. *Mason*, 45 Barb. 37).
2. *Held*, also, that the amount of the note was *prima facie* the rule of damages. But that the defendants could show, in mitigation of damages, that the indorser was insolvent, or not worth property sufficient to enable the amount to be realized by process on a judgment. And if the indorser was shown to be wholly insolvent, and destitute of means, the defendants were entitled to a verdict (*Id.*).
3. In such an action the plaintiffs are entitled to recover such damages only as they have sustained, having reference to the amount of property which the indorser was possessed of as owner (*Id.*).
4. Indorsements of _____ as were obtained by him _____ as on the part of the in _____ u- tently diverted such _____ to purpose for which _____ a, and transferred the _____ \$, and the latter gave _____ a, payable at future periods; it being agreed being the parties that such checks should not be presented at the bank, but that when the money was wanted they should be returned to the plaintiff, and new checks given. This arrangement was subsequently carried out. But before the checks had been presented or exchanged, and before anything had been paid, or was to be paid, the plaintiff was informed by the indorser, of the fraud which had been practised, and was requested not to pay or advance any more money on the notes to the maker. *Held*, that the plaintiff was not a bona fide holder of the notes, as against the indorser; he having parted with nothing, and paid no valuable consideration therefor, until after he was notified of the fraud (*Crundall* agt. *Fitcher*, 45 Barb. 134).
5. Where the promise contained in a promissory note is absolute, parol evidence cannot be received for the purpose of incorporating into the contract a condition which might affect, or change the character of the contract between the parties (*Thompson* agt. *Hall*, 45 Barb. 214).
6. This rule of evidence has been expressly applied in cases of sureties (*Id.*).
7. Where a note is made for the accommodation of the indorser, without any restrictions, it may be used by him for that purpose, and the holder may recover upon it, even if he had knowledge of its origin, to any amount for which he holds it as security, not exceeding the sum named in the note (*The East River Bank* agt. *Butterworth*, 45 Barb. 476).
8. Nor will it make any difference whether the note was used before or after maturity, if it was in reality pledged as security for moneys borrowed by the indorser (*Id.*).
9. The giving of a new note, by an indorser, for the amount due upon the original note, such original note being left with the holder as security, does not amount to payment of the latter (*Id.*).
10. The certificate of the notary who had protested a promissory note was, that he served the notice of protest on the indorser "by leaving the same at his desk in the New York custom house, he being absent therefrom, with a person in charge, said notice being directed to the indorser." *Held*, that the service was *prima facie* sufficient, in the absence of any proof to the contrary (*The Bank of The Commonwealth* agt. *Mudgett*, 45 Barb. 608).
11. *Held*, also, that such a service would be sufficient, as having been made at the place of business of the indorser (*Id.*).

QUARANTINE.

1. By the statute establishing and regulating quarantine at the lower bay of New York, the legislature never intended that Staten Island should be a place where any operation of quarantine except to bury the dead, should be carried on (*Singue* agt. *Smith*, ante, 393).
2. Therefore, the commissioners of quarantine, or the metropolitan board of health, or both jointly, will be restrained by injunction from removing from the quarantine vessels any persons who are the subjects of quarantine treatment to Sequino's Point, on Staten Island (*Id.*).

RAILROAD COMPANIES.

1. The want of caution which constitutes negligence in crossing a railroad, must in any given case depend upon the circumstances under which the

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party is placed at the time (*Besiegel* agt. *The N. Y. Central Railroad Co. ante*, 181).

2. The object of requiring an engineer upon a railroad engine to sound an alarm before reaching the crossing, is to put the way traveller on his guard; and when the engineer neglects the necessary signals, he deprives the traveller of one of the means upon which he has a right to rely for protection against the danger of a collision (*Id.*).
3. When a man on foot reaches a point near the crossing of a railroad in a populous part of a city, and listens and hears no signals or warning, he is not guilty of negligence for attempting to cross over the track, where he cannot see up and down the track by reason of obstructions (*Id.*).
4. But the railroad company ought not to be held liable for a collision in such a case, when they run their locomotives with moderate speed, and make the usual signals before reaching the crossings (*Id.*).
5. Where the plaintiff undertook to cross a railroad in a populous part of a city, over five tracks running east and west in a straight direction, just after a train of cars had passed from the west, in which direction there was nothing to obstruct his vision, but eastwardly his vision was obstructed, except about ten feet, by freight cars, which stood near him on the two first tracks, and hearing no bell or whistle, he stepped upon the third track without looking east at all, but continued to look to the west, and before crossing, was hit and injured by a locomotive backing down from the east at a rapid rate: *Held*, that the question of the plaintiff's negligence was one for the jury, and that a non-suit in the case was improperly granted (*Id.*).
6. *It seems*, that way travellers, in crossing railroads, especially in cities, where obstructions to sight are frequent, have a right to depend upon their hearing as well as their vision, for protection in crossing (*Id.*).
7. Railroad corporations, engaged in the transportation of property, are subject to the absolute responsibility, which by the common law, rests upon common carriers; they are, except as against loss or injury occasioned by the act of God, or of a public enemy, insurers of the safe transportation and delivery of the property intrusted to them for carriage (*Heineman* agt. *The Grand Trunk Railway Co. ante*, 430).
8. Common carriers cannot by contract, shield themselves from liability from their own fraud, or their own willful act or negligence; but they may contract against liability for that low degree of negligence or want of care on their part which is not equivalent to willful or wanton neglect of duty, or recklessness (*Id.*).
9. Common carriers may also by special contract relieve themselves from all responsibility for injury to, or loss of the property intrusted to them for carriage, occasioned by the negligence, misconduct, fraud or felony of their employees or servants (*Id.*).
10. Where the plaintiff signed a special contract made by the defendants as common carriers, in which was a clause "that the owner of the within mentioned animals undertakes all risk of loss, injury, damage, and other contingencies, in loading, unloading, conveyance and otherwise," and by which contract the defendants undertook to transport for the plaintiff from Stratford, in Canada West, to Buffalo, in this state, a car load of horses, and as the plaintiff alleged, the defendants carelessly, negligently, wrongfully and willfully, run the car containing the horses on to a side track of its road, and kept them locked up for four days and nights, without food or drink, and by its agents refused to permit them to be unloaded so they could be fed—it being impossible to feed them in the car; by reason whereof the horses were nearly starved to death, and thereby rendered comparatively valueless: *Held*, that an action by the plaintiff against the defendants for damages by reason of such negligent, wrongful and willful acts, could not be sustained. The plaintiff was properly non-suited. (*VERPLANCE, J. dissenting.*) (*Id.*)
11. Where a railroad is laid in a public street, under a permissive grant to the company to use a portion of the street for that purpose, the company does not acquire the same unqualified title and right of disposition to the land occupied, which individuals have in their lands (*The Sixth Avenue R. Co. agt. Kerr*, 45 Barb. 138).
12. The only exclusive power conferred by such grants is that of using railroad carriages, in the same manner as the grant of a stage line confers, for the time being, the grant of a monopoly of using such stages, for

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the transportation of passengers for hire, on that route (*Id.*).

13. After a railroad company has obtained permission from the common council of New York, to lay a railroad through certain streets of the city, and such grant is subsequently confirmed by an act of the legislature, the legislature has the power to grant similar privileges to another company, and to authorize the latter to run upon, intersect, or use any portion of the tracks already laid, on condition of making compensation or payment to the first grantees if the parties do not agree (*Id.*).

14. Such a grant is not a violation of any right of property. The grantees must be considered as holding the grants for the public use, in the public street, which is all open to the public (*Id.*).

15. The right to grant a crossing of the road necessarily involves a right to pass over a larger portion of such road, when the legislature so directs (*Id.*).

16. After evidence has been already given, in an action against a railroad company to recover damages for an injury arising from a collision between the defendant's cars and the plaintiff's wagon, at a street crossing tending to show that on the occasion of the collision, the flagman stationed there was intoxicated, and was absent from his post of duty, it is proper for the plaintiff to show that the flagman had, for some weeks before the occurrence, been indulging in habits of intemperance, so as to unfit him for the duties of his station; as bearing to some extent on the question of the defendant's carelessness (*Warner* agt. *The New York Central Railroad Co.* 45 Barb. 299).

17. When a railroad company has adopted the precaution of keeping a flagman at a particular crossing, as a mode of giving notice of the approach of trains, and has continued the custom for several years, the absence or presence of the flagman at his post, is a circumstance which the public has a right to notice, and to take into the calculation of the measure of safety in crossing the railroad track at a given time (*Id.*).

18. Under such circumstances, the public have the right to suppose that no train is due or approaching, if the flagman is absent from his post (*Id.*).

19. If the place where a railroad track crosses a highway is a place of dan-

ger, so much so that the corporation has voluntarily undertaken the duty of keeping a watchman there, and has continued it through a series of years, until the public has become accustomed to regard his presence or absence, as one of the evidences of the approach of trains, or otherwise, it is a part of their duty to keep a fit person, whose conduct will not be liable to mislead and deceive the traveling public (*Id.*).

20. A railroad corporation, by acquiring the right to construct its road across a highway, and obtaining title to the land for its road bed, does not destroy or impair the public easement. The perfect and unqualified right of every citizen to pass over the road at that point, remains the same as before (*Id.*).

21. It is not a question of superior, or subordinate right, in passing, which arises in an action for damages occasioned by a collision between a locomotive on the railroad and a vehicle upon the highway, but a question merely of the exercise of suitable caution and prudence, by either party in the exercise of a common and equal right (*Id.*).

22. In such an action, it is proper for the court to hold, that the railroad company is bound to exercise a proper degree of care and prudence towards the traveling public (*Id.*).

23. A statute declaring that railroad companies shall not charge more than three cents a mile for the transportation of a passenger and his ordinary baggage, under a penalty, does not apply to railroads in cities composed of separate vehicles drawn by horses, unprovided with apartments for the safe keeping and transportation of baggage, the vehicles of which must stop at any part of the route where a passenger presents himself, and for him to leave when he wishes, the compensation for whose carriage cannot be adjusted by the standard of miles, but must be one fixed sum, whether he goes the entire distance or not; but it applies only to railroads whose cars are propelled by steam, which transport passengers and their baggage from one fixed place or station to another, without stopping at any intermediate point, and in which it is possible to adjust beforehand the amount of fare to be paid from place to place (*Hoyt* agt. *Sixth Avenue R. Co.* 1 Daly, 528).

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RECEIVER.

1. In an action brought by a receiver, in supplementary proceedings, and in pursuance of the order appointing him, to set aside a conveyance of real estate made by the judgment debtor, to a third person, and the defendant succeeds on the trial, the *judgment creditors* of the debtor, who are not parties to the action, and took no part in its prosecution, are not liable for the costs of the action (*Following the decision in the case of Wheeler agt. Wright*, 28 How. Pr. R. 228). (*Outler agt. Reilly, ante*, 472).
2. The law making parties in interest liable for costs, was not intended to apply to actions brought in the name of sheriffs, receivers, clerks or other officers of the court, although third parties might be interested in the recovery, unless the action was brought at the sole suggestion and urgency of such parties, and virtually conducted by them, and especially so, to a case where the action was brought by direction of the court (*Id.*).

RECOGNIZANCE.

1. As the statute only requires that recognizances in criminal cases, not taken in open court, "shall be in writing, and shall be subscribed by the parties to be bound thereby," it is only necessary that the criminal should appear before the judge, to confer jurisdiction upon such judge to let him to bail. This is all the statute requires (*The People agt. Hurlbutt*, 44 Barb. 126).
2. The judge has authority to accept of individuals as sureties in the recognizance, though they do not personally appear before him. The better practice, however, is for the judge to require the person desiring to be let to bail to bring his sureties before him; and a judge would be justified in refusing to let a person to bail whose sureties do not personally come before him (*Per BALCOM, J.*). (*Id.*)

REFEREES AND REFERENCE.

1. Where a receiver of a corporation procures the appointment of referees, to whom a matter in controversy between him as receiver and other parties is referred, pursuant to the statute, and the referees, after hearing the proofs and allegations of the parties, make their report, the statute does not authorize any *judgment* to be entered upon such report; and the

court has no jurisdiction to render a judgment thereon, without action (*Matter of Austin*, 44 Barb. 494).

2. Referees have the same power to allow amendments to pleadings as the court, on the trial, and upon the same terms, and with the like effect. A referee may therefore grant an amendment of the complaint, not introducing a new cause of action distinct from that under which the plaintiff first sought to recover, or may disregard an immaterial variance between the complaint and the proof (*Dunnigan agt. Crumney*, 44 Barb. 528).
3. It is not erroneous for a referee to refuse to allow the defendant to serve an amended answer to the complaint as amended, where the defendant does not show that he was misled, or disclose facts showing wherein he was misled, but merely states it as his opinion, and that of his counsel, that an amendment of the answer, and further evidence will be necessary (*Id.*).
4. Where there is a conflict of evidence, before a referee, his finding of facts is as conclusive as is the verdict of a jury (*Smith agt. McCluskey*, 45 Barb. 610).
5. Referees are no longer officers of, or under the control of the court. They become by appointment an *independent tribunal* having such powers as are given by statute, and their decisions are reviewable only *on appeal* from their judgment (*Woodruff agt. Dickie, ante*, 164).
6. Referees now possess all the powers of the court, and their allowance or disallowance of an amendment can only be reviewed, if reviewable at all, in the manner other decisions are reviewed *on appeal* (*Id.*).
7. In an action to recover dower, where the court adjudge that the plaintiff is entitled to dower, it may appoint a referee to *admeasure the plaintiff's dower, and assess her damages by loss of rents and profits*, instead of the three freeholders formerly required in an action of *ejectment for dower*. (2 R. S. 312, § 48, sub. 1; *Id.* p. 310, §§ 86 to 47;) or a *special petition* (*Id.* 489, § 10). *Brown agt. Brown, ante*, 481.)
8. Where a referee is appointed for the purpose of admeasuring and assigning dower, &c., the defendant waives every objection, except a want of jurisdiction and even a *right of appeal* from the order of reference, by litigating before the referee without such

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appeal, and by filing exceptions to the report (*Id.*).

9. On appeal also, such an error in the proceeding as admeasuring dower by a referee, instead of the three freeholders, should be disregarded, as not affecting the substantial rights of the defendant (*Id.*).

RELEASE.

1. A seal is not necessary to render a release and discharge of a liability upon a promissory note valid and effectual, if the agreement to release and discharge is upon good and sufficient consideration. If not deemed a technical release, such an arrangement will operate as an accord and satisfaction, and will thus be effectual to protect the parties intended to be discharged, in case of a sufficient consideration to give it support (*The Farmers' Bank of Amsterdam* agt. *Blair*, 44 Barb. 641).

RELIGIOUS CORPORATIONS.

1. When the same persons act in a double capacity, as agents or trustees, they must see to it that their transactions are fair and unexceptionable, as regards the rights of either of the parties they represent. If any motive of personal convenience or interest has been subserved, it will constitute a badge of fraud (*St. James' Church* agt. *The Church of the Redeemer*, ante, 381).
2. Where several persons acting for the church of the Redeemer—the defendants as trustees, presented an application to themselves as trustees of the church of St. James—the plaintiffs, for pecuniary aid; and the same persons acting for the plaintiffs, granted the application, and caused to be conveyed to the defendants, real estate, producing nearly two-thirds of the whole income of the plaintiffs, without the payment of any consideration but for the sole purpose of affording pecuniary assistance gratuitously: *Held*, that the transaction was destitute of honesty (*Id.*).
3. And the order of this court permitting the conveyance, constituted no estoppel in favor of the grantee, who had parted with nothing as the consideration for the deed. The order was not an adjudication between the parties, and had not the effect of *res adjudicata* (*Id.*).

RES ADJUDICATA.

1. Where the affidavit of the defendant in summary proceedings to dispossess for the non-payment of rent, raises two questions, and the jury finds generally for the defendant, both questions are presumptively *res adjudicata*, and in a subsequent proceeding, in which one of such questions arises, it is for the plaintiff to show that it was not passed upon by the jury (*Yonkers and N. Y. Fire Ins. Co.* agt. *Bishop*, 1 Daly, 449).
2. Where, in the summary proceedings, the defendant's affidavit denied his indebtedness on various grounds, including that of eviction by title paramount, and also denied any demand of the rent, and the jury found a general verdict for the defendant: *Held*, in a subsequent action for the same rent, that the verdict was presumptively *res adjudicata* on both points, and that it was for the plaintiff to show that the jury only passed on the question of demand (*Id.*).

SALE OF REAL ESTATE.

1. A purchaser of real estate at a public sale will not be released by the court from his purchase, upon the ground, 1st. That a party who it is alleged has an interest in the property, was not made a party to the proceedings for the sale, where it is offered on the hearing of the application, to furnish a release of all the interest of such party in the premises (*In the matter of Margaret R. Bull*, ante, 69).
2. 2d. That certain heirs at law having, as alleged, an interest in the property under the will of the testator, had not been made parties to the proceedings for the sale, where it appeared from the will that the income of the property was given to M. (a daughter), for life, and after her death without issue, to go to his son J. in fee, and he having died before M., leaving a will disposing of his property to his minor children: *Held*, that these minor children of J., could not be necessary parties to the proceedings for the sale, as they had no interest in the property; J., their father, having no interest therein which he could dispose of by will until the death of M., who was then alive (*Id.*).
3. 3d. That two only of the three executors had executed the conveyance, where it appeared that the three executors named in the will had qualified, but one of them of them soon after—

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wards left the United States, and was removed from the office of executor by the surrogate, but had since returned to the United States, and declined to unite in the conveyance: *Held*, that where a trustee resigns or is discharged from his office, the remaining trustees are vested with the entire estate; and the same rule would seem to apply to the removal of an executor by the surrogate. The power he obtains to execute the trust is given to him not by name but as executor, and when removed as executor his relation to the estate ceases (*Id*).

4. But in this case, the sale of the property was not made by the authority contained in the will, but under and by virtue of the statute—acts of 1864 and 1865. The legislature had power to authorize the sale to be made by any officer of the court, or in such manner as the court should direct; and also had power to direct who should execute the conveyance. This they did when they directed that the conveyance should be executed by the said trustees; and that the notice be served on the *two acting executors by name*; the other executor having been removed, and having ceased to act long before the passage of either act (*Id*).

See STATUTE OF FRAUDS, 1, 2, 3, 4, 5

See CONTRACT, 6, 7, 8, 9, 10.

SALE OF CHATTELS.

1. An agreement was entered into between the plaintiff and defendant, for the sale of a cracker machine by the former to the latter, and there was a delivery and an acceptance of a portion of the machine. That portion of the machine not delivered was taken by the plaintiff to a machine shop, at the request of the defendant, for the purpose of being cleaned, which was to be done at the joint expense of both parties. After the cleaning was completed, it was paid for by the plaintiff and that portion of the machine taken by him and tendered and offered to be delivered to the defendant: *Held*, that there was a valid sale of the machine, and not merely an executory contract for a sale, where something remained to be done on the part of the vendor, before the delivery of the property (*Dunnigan agt. Crummey*, 44 Barb. 528).

2. *Held*, also, that the act of taking the machine, by the plaintiff, being for the benefit of the defendant, and his

act, it was a delivery to the plaintiff as his agent, and the latter merely occupied the position of an agent, in conveying the property to the machine shop and returning it to the defendant, and the same was not held at his risk: *Held, further*, that a portion of the machine having been actually delivered to the defendant, and the balance being in the hands of the plaintiff for the benefit and at the request of the defendant, and under the control and subject to the order of the latter, this was a sufficient delivery of the property (*Id*).

3. It is a general principle that when goods are ordered to be sent by a carrier, a delivery to the carrier operates as a delivery to the purchaser, in whom the title immediately vests, subject to the vendor's right of stoppage in transitu; and the goods, in the course of transit, are at the risk of the purchaser. But where it is apparent, from the circumstances under which the delivery was made, that the vendor did not trust to the ability or readiness of the purchaser to perform his contract, and intended to insist upon strict prepayment as a condition of delivery by the carrier: *Held*, that such delivery by the vendor to the carrier, is not within the general rule, and does not operate to pass title (*Baker agt. Bouricault*, 1 Daly, 23).
4. A tender by the vendor, of an indorsed custom house permit, authorizing a delivery of the goods by the warehouse man, it appearing that the permit was sufficient if indorsed by the vendor, to enable the vendee to take possession: *Held*, a sufficient offer of delivery of the goods. The want of the indorsement was immaterial, as the indorsement could have been made immediately, had the vendee made objection on that ground (*Dunbar agt. Pettee*, 1 Daly, 112).
5. Where it appears from the course of dealing of the warehouse man, or by the agreement of the parties, that the goods stored will be delivered without requiring immediate payment of the storage, the warehouse man relying upon the personal credit of the party, there is no lien; because such a course of dealing is inconsistent with an implied agreement at the time of the deposit, that the property is not to be taken away unless the storage is paid (*Id*).
6. There being no lien upon the property for storage, and the vendee on the permit already tendered having the right to the possession of the property, it would be unreasonable to require

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that, at the time of the delivery, the vendor should pay the storage (*Id.*).

7. The plaintiffs sold to N. and S. jointly, a quantity of goods, to be paid for in cash, on delivery, or by the note of S. at three months, indorsed by N. The plaintiffs delivered part of the goods, but refused to deliver the residue, on the ground that S. had failed. Plaintiff made no tender of the goods, nor demand for either cash or the note, but brought his action for the value of the goods before the expiration of the three months: *Held*, that a motion for the nonsuit should have been granted. 1st. The contract being an entirety, no recovery could be had until the whole of the goods were delivered. 2d. The insolvency of one of the purchasers was no excuse for the plaintiff's neglect to tender delivery to the other, and make the election either to take the note or cash (*Soloman agt. Neidig*, 1 *Daly*, 200).

8. Where a vendor, at the time of the sale, agrees, that if the goods when delivered are inferior to the sample, they may be exchanged, it is a conditional sale, and the inferiority of the goods is no defense to an action for the price. The vendee should, on discovering the quality of the goods, tender them back to the vendor, or at least notify him of the defect; and failing to do so, he is estopped from denying their value (*Fisher agt. Merwin*, 1 *Daly*, 234).

9. Where, by a custom of the trade, a purchaser of goods on shipboard is bound to unload within a definite time, and by reason of the purchaser's failure to take the goods within that time, the owner is obliged to pay light-erage and storage fees thereon: *Held*, that the purchaser is liable for such payments (*Dayton agt. Rowland*, 1 *Daly*, 446).

SEDUCTION.

1. Proof of the slightest degree of service is sufficient to establish the relation of master and servant, in an action for seduction, and to allow a recovery for the heaviest damages (*Badgley agt. Decker*, 44 *Barb.* 577).

2. The real gravamen of the action for seduction is not the loss of service, but the mortification and disgrace of the family, and the wounded feelings of the plaintiff. The plaintiff is not restricted to compensatory damages. And it is not erroneous for the judge to charge the jury that in estimating the amount, they may take into con-

sideration the wounded feelings of the plaintiff and the disgrace to the family (*Id.*).

3. A married woman having a right, under the statutes of 1860 (*Laws of 1860, chap. 66, § 2*), to keep a boarding house on her own account, and consequently to employ servants, for any injury to her servant, *per quod servitum amisit*, a right of action accrues to the wife, equally as if she were unmarried; that being a necessary incident to the right to carry on business on her own account. Hence for seducing and debauching her servant, followed by a loss of service, she may sue in her own name, without joining her husband with her (*Id.*).

4. Where a mother sues for the seduction of her daughter, she is so connected with the party seduced as to authorize the jury to consider, and give damages for the injuries received by her through her daughter's dishonor. (*Per PARKER, P. J.*) (*Id.*).

SHAM PLEADING.

1. Where, on a motion to strike out as sham a defense good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified or questioned, and which tend to sustain the defense: *Held*, that the motion will be denied (*Hadden agt. N. Y. Silk Manufacturing Co.* 1 *Daly*, 388).

2. Sham pleading is the setting up of a defense which has not only no foundation of fact, but which, it is manifest, was interposed for vexation or delay. An answer will not be adjudged to be sham simply upon an affidavit that it is false, for this would be trying the merits of the defense upon affidavits. But the court must be satisfied from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the pleader was either to delay or annoy the plaintiff, or else to trifle with the court by way of amusement, by getting it to pass upon legal quibbles, or engage in a futile investigation (*Id.*).

SPECIFIC PERFORMANCE.

1. A vendee, who has fulfilled his contract of purchase, may obtain a decree for specific performance against parties, who, with notice of his equities, succeeded to the interest of the vendor (*Laverty agt. Moore*, 33 *N. Y. R.* 658).

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SHIPPING.

1. For supplies furnished a vessel upon the order of the captain, while acting for the owners, the owners are liable *in solido*; and a non-joinder of any part owner in an action to recover for such supplies, may be taken advantage of by plea in abatement (*Sager* agt. *Nichols*, 1 *Daly*, 1).
2. Lighterage is the price paid for unloading ships by lighters or boats, and a charge for taking a boat to another pier instead of the usual one of delivery, would not be embraced under that term. Demurrage is only recoverable where it has been expressly stipulated for, though where there has been an unreasonable or improper detention of the vessel by the act of the freighter or consignee, damages may be recovered by the owner (*Western Transportation Co.* agt. *Hawley*, 1 *Daly*, 327).
3. A mariner who is in a vessel when she commences her voyage, but who leaves her while she is temporarily stayed in the harbor by accident, head winds, or other causes, before she reaches the main ocean, has not "proceeded to sea," in the sense in which that term is to be understood in an agreement for the payment of money upon that condition (*James* agt. *Hagan*, 1 *Daly*, 517).
4. Where it was agreed that money should be paid to a seaman as soon as he should proceed to sea, agreeable to the shipping articles, and the ship started, but before leaving the harbor was compelled by accident to return: *Held*, in the absence of proof of the contents of the shipping articles, that the condition of the agreement was unfulfilled, and there could be no recovery on it (*Id*).

STATUTE OF FRAUDS.

1. Where there is no note or memorandum in writing made of the contract of sale of personal property for over \$50, nor no part of the purchase money paid, the validity of the agreement must depend upon whether the buyer *accepted or received* any part of the property agreed to be sold (*Good* agt. *Ourtiss*, *ante*, 4).
2. In order to constitute an acceptance or receiving of a part of the property within the meaning of the statute, it is necessary that there should be some *act*, something done indicating it beyond words merely. Accordingly, where the vendor and vendee, with

the property before them, agree upon the terms of sale and the price to be paid, and that the goods which is the subject of the contract shall become the property of the vendee, the title does not pass (*Id*).

3. But it is not necessary that any part of the goods should be accepted or received by the buyer at the time of the contract; an acceptance or receiving of the same at any time afterwards, if it be done under the contract, and *while that remains unrevoked*, will be sufficient to comply with the requirements of the statute (*Id*).
4. Where in an action upon an account against the defendants, they undertook to set off the value of some personal property which they claimed they had sold to the plaintiff, and that he had accepted a portion of it, which was in his possession, and ratified the agreement by its sale to a third person:
5. *Held*, that this action, having been commenced by the plaintiff some three weeks before he sold the property to such third person, was an unmistakable indication of the plaintiff's intention to disaffirm the contract, alleged by the defendants for the sale of the whole property previously, especially as the value of the property claimed by the defendants, largely exceeded the plaintiff's account. Besides the positive testimony was sufficient to show that the alleged contract was discarded by the plaintiff, even though the sale of a portion of the property by the plaintiff, subsequently, might be considered a wrongful conversion of it by him (*Id*).
6. If a *written agreement* is signed by the party sought to be charged, and is certain, fair and just, in all its parts, it is not necessary that it should be signed by the party seeking to enforce it, in order to its *specific performance*. That is, the want of *mutuality* is no objection to its enforcement (*White* agt. *Schuyler*, *ante*, 33).
7. A written agreement to re-convey at a certain time, for a valuable consideration, a certain number of shares of the capital stock of a "Steam Towboat Association," and to pay certain dividends received thereon, may be *specifically performed*, notwithstanding an objection that the contract relates to a class of property in regard to which it is not usual to direct a specific performance, on the ground that the party has an adequate remedy at law in damages. There may or may not be an adequate remedy at

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- law, and besides the parties have specifically agreed to re-convey (*Id.*).
8. Where the time within which an agreement is to be performed is purely a question of fact, which has been considered with care by the judge at special term, the court at general term will not usually disturb the decision made thereon (*Id.*).
9. The defendant, the clerk of the plaintiff, who was a hatter, told the latter that if any of his personal friends bought hats on credit, he would pay for them if they did not. The defendant sold hats to his friends which were charged to them on plaintiff's books. *Held*, that the promise of the defendant was collateral, and within the statute of frauds, and therefore void. (*Knox agt. Nutt*, 1 Daly, 113).
10. The defendant, by an oral agreement, promised to deliver to the plaintiff a quantity of butter, of the value of over \$100. The defendant being at the time indebted to the plaintiff in the sum of \$4.50, for a barrel of flour charged to him in account, it was a part of the contract that that sum should apply as a partial payment towards the butter. The entry of the sale, in a book, the entry also the defendant accepted the entry on the butter. But no entry on plaintiff's account that the flour was paid for, or otherwise. *Held*, that part payment to take the case out of the statute of frauds (*Tied agt. Tied*, 44 Barb. 96).
11. In October, 1855, the plaintiff let the defendants have ten sheep, of a certain quality and grade of wool, the defendants agreeing to deliver to him, at the end of four years, twenty sheep of as good quality and grade. At the expiration of four years, the parties made another agreement, by which the defendants, instead of delivering the twenty sheep then due, promised to deliver to the plaintiff forty sheep of as good quality and grade, at the end of four years more, which the plaintiff promised to accept in lieu of said twenty sheep. In an action upon the last agreement it was *held*, that it was within that provision of the statute of frauds which makes void every oral agreement that by its terms is not to be performed within one year from the making thereof. Although an agreement on which a party relies is void by the statute of frauds, he is not, in general, without remedy, inasmuch as where a contract has been fully performed, and the performance accepted, a recovery may be had on a quantum meruit or salary, if not on the contract itself (*Barfield agt. Wheeler*, 44 Barb. 108).
12. Previous to the purchase of mortgaged premises, by C. at a foreclosure sale, it was agreed by parol between him and M. that M. should have the premises conveyed to him, upon payment to C. of the amount of his bid, with interest and costs. M. was then in possession of a portion of the premises, which he held under a contract to purchase, from a former owner. After C. had purchased, this parol agreement was renewed, or reaffirmed by parol, and C. gave up to M. the possession of the residue of the premises, and authorized him to keep possession and rent the same. M. accordingly rented a portion of the premises, to a tenant, and made payment according to his parol agreement, amounting to more than one-third of the purchase money, which C. accepted and received. *Held*, that such possession and part payment took the parol agreement out of the operation of the statute of frauds; and that the agreement could have been enforced, specifically against C. *Held*, also, that M. being then in possession, under a contract rendered valid, and capable of being enforced, by part performance, it was not in the power of C. by an agreement with a third person, to which M. was not a party, to take away M.'s right under his contract or to burden them with new or more onerous conditions, especially where such third person was fully informed at the time of his purchase, of the agreement with M. and what had been paid, under it (*Mortgage agt. Andrews*, 44 Barb. 300).

STATUTES.

1. The penal laws of a state being strictly local in their character and effect, there can be no recovery for an offense under them, committed beyond the territorial jurisdiction of the state (*Peterson agt. Walsh*, 1 Daly, 102).
2. The offenses which constitute disorderly conduct under the acts of 1853, chapter 11, and of 1855, chapter 303, are different from the offenses which will constitute a "disorderly person," under the act of 1853, and the Revised Statutes. In common parlance, one who is guilty of disorderly conduct may be regarded as a disorderly person, but these terms "disorderly persons," and "disorderly conduct," are used in the statutes as distinguish-

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- ing distinct and different offenses. There are, under the statute regulating these summary convictions before a magistrate without a jury, three classes of offenders. 1. Vagrants. 2. Disorderly persons. 3. Persons guilty of disorderly conduct; each of which is distinguishable from the other, and in each the course of procedure is different (*Matter of Miller*, 1 *Daly*, 562).
3. The twentieth section of the act of 1860, chapter 508, which declares that certain acts shall constitute disorderly conduct, was not intended to limit the offense to such acts. The only effect of it is, that it leaves nothing to the discretion or opinion of the magistrate where such acts are proved, but makes it his duty to commit (*Id.*).
 4. Where a power is given to a board of commissioners by statute, the official act of one of the members will not suffice, but it must appear that the board acted in the premises (*Id.*).
 5. A commitment for disorderly conduct until the offender finds security in a certain sum for his good behavior is bad, as it is equivalent to perpetual imprisonment, if he should be unable to find security. It must be for some fixed term or period, and must not exceed twelve months (*Id.*).
 6. All which is essential to constitute a court, exist in the proceeding which is had before a judge upon a writ of *habeas corpus*; the *actor*, or plaintiff, the *reus*, or defendant, and the *judex*, or judicial power which is to examine into the fact, the law arising upon it, and to apply the remedy; the officer acting not ministerially but judicially, with authority by statute to imprison (*Id.*).
 7. Where an authority is created by statute, with power to fine or imprison, the officer, person or body invested with such authority is, for that purpose, deemed a court (*Id.*).
 8. By the act of the legislature, passed April 4, 1849 (*Laws of 1849, chap. 200*), provision was made for compensation to the owners of the pier connected with the canal basin at Albany, for all their rights in the said basin, and to the tolls to which they were entitled, by directing that the sum of \$30,000 should be paid to said pier owners "in lieu of tolls as heretofore paid to them;" provided the pier proprietors and the corporation of the city of Albany should, within six months, file in the office of the secretary of state, their consent to the terms and provisions of the act, and a release to the people of the state of all their interest in the said basin. The act also repealed the section of a previous act, by which alone the right to the tolls was originally conferred. The consent and release were duly filed, within the period specified in the act; but the \$30,000 directed to be paid to the proprietors of the pier were not paid till the 9th of April, 1850, and then without interest; *Held*, that the true construction of the act was that the right to the tolls, and the interest of the pier owners in the basin, and the revenues thereof, were designed to be extinguished, from the period of the passage of the act, in the event of its subsequent acceptance by such pier owners (*The People ex rel. Corning agt. Benton*, 44 *Barb.* 441).
 9. Accordingly *held*, that the acceptance of, and compliance with, the provisions of the act by the pier owners, within the time required was an effectual extinguishment of all right to tolls accruing after the passage of the act: *Held, also*, that if there was any equity on the part of the pier proprietors to receive interest on the \$30,000, either from the passage of the act, or from the date of their acceptance of its provisions, that was a consideration to be addressed to the legislature, and could not influence the court on an application for a mandamus to enforce the payment of the money (*Id.*).
 10. The act of the legislature providing for the enlargement of the Erie canal, passed April 1854, declared that nothing therein contained should authorize the canal board to abandon the existing canal through cities or incorporated villages: *Held*, that the act recognized a species of vested right on the part of persons who had made valuable erections and improvements in the cities and villages adjacent to the canal, to have the canal continued as then located (*The Bank of Auburn agt. Roberts*, 45 *Barb.* 407).
 11. Where a statute authorized trusts of real property to be created for the benefit of persons owning or occupying mill privileges on a certain creek or stream, the object of such trusts being the improvement of said stream by increasing the head of water, and regulating the flow thereof for the supply of mills, &c., on said stream, in the manner specified; and declared that the annual value or income of the property so to be held in trust, should not exceed two thousand dollars: *Held*, that the terms "annual value or income," as used in the act,

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- law, and besides the parties have specifically agreed to re-convey (*Id.*).
8. Where the time within which an agreement is to be performed is purely a question of fact, which has been considered with care by the judge at special term, the court at general term will not usually disturb the decision made thereon (*Id.*).
9. The defendant, the clerk of the plaintiff, who was a hatter, told the latter that if any of his personal friends bought hats on credit, he would pay for them if they did not. The defendant sold hats to his friends which were charged to them on plaintiff's books: *Held*, that the promise of the defendant was collateral, and within the statute of frauds, and therefore void (*Knox agt. Nutt*, 1 *Daly*, 213).
10. The defendant, by an oral agreement, promised to deliver to the plaintiff a quantity of butter, of the value of over \$100. The defendant being at the time, indebted to the plaintiff in the sum of \$6.50, for a barrel of flour charged to him in account, it was a part of the contract that that sum should apply as a partial payment towards the butter. The plaintiff made an entry of the sale, in a memorandum book; the entry also stating that the defendant accepted the barrel of flour on the butter. But no entry was made on plaintiff's account book, to show that the flour was paid for by the butter, or otherwise: *Held*, not a sufficient part payment to take the case out of the statute of frauds (*Teed agt. Teed*, 44 *Barb.* 98).
11. In October, 1855, the plaintiff let defendants have ten sheep, of a certain quality and grade of wool, the defendants agreeing to deliver at the end of four years, twenty of as good quality and grade. At the expiration of four years, the plaintiff made another agreement with the defendants, instead of the twenty sheep then due, to deliver to the plaintiff
- accepted, a recovery may be had *quantum meruit* for the value of the contract itself (*Wheeler*, 44 *Barb.* 162).
12. Previous to the purchase of premises, by C. and M., C. had agreed to sell the premises to M. and M. had agreed to sell the premises to C. of the same premises, which he had purchased from C. After C. had agreed to sell the premises to M. by parol, and M. had taken possession of the premises, and C. had accordingly received the purchase money, to a certain amount, the plaintiff accepted possession of the premises by parol of the defendant, and the defendant agreed to sell the premises to the plaintiff.

STREET ASSESSMENTS.

1. There is no statute requiring that an assessment for regulating and grading streets, &c., in the city of New York, shall be made *only after the completion of the work* (*Matter of James W. Beekman, ante, 16*).
2. If the assessment precedes the performance of the work, an *estimate* of the expense must be first made; but after the work has been completed, and the expense has been paid or incurred, or definitely ascertained, the estimate is superfluous (*Id.*).
3. Where all the work has been contracted for, but a portion of it only has been completed when the assessment is made, an *estimate* is necessary in order to ascertain the amount to be assessed (*Id.*).
4. It is not necessary that the duties to be performed by the assessors should be named in the ordinance. The law has prescribed the duty which they are to perform (*Id.*).
5. Where the assessors consisted of three members, two of whom were appointed by original ordinance in 1853, and one by the board of commissioners of taxes under the act of 1859, in place of one of the original assessors who had resigned after the assessment list had been reported to the board of revision; and the boards after such resignation, returned the list to the assessors for correction:
6. *Held*, that it was a legal irregularity for the two original assessors to proceed to correct the assessment, without inviting or requesting the other recently appointed assessor to act with them (*Id.*).
7. The statutory rule, as well as the rule of the common law, applicable before the act of 1859, which authorizes a majority of the board of assessors to be appointed under that act, to make estimates and assessments, requires all the members to *meet and consult*, although a majority may *decide*, unless special provision is otherwise made (*Id.*).
8. It may be lawful for two to act, if one neglects or is unable to perform duty as an assessor, but it is illegal to exclude one assessor from acting, *intentionally* (*Id.*).
9. Where assessors in the city of New York, appointed to assess lands for a local improvement, assess the lots of an owner at more than one-half the value of such lots, as valued by the

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referred to the association itself, and not to its members individually; and did not mean the benefit which each member should derive from his mill privilege or business, but a collective value or income received by the association as such, under the statute (*The Troy Iron and Nail Factory* agt. *Corning*, 45 Barb. 231).

STATUTE OF LIMITATIONS.

1. The section of the Revised Statutes which provides that the term of eighteen months after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of an action against his executors or administrators (2 R. S. 448, § 8), is not repealed by section 102 of the Code of Procedure, by which it is declared, that if any person entitled to bring an action shall die before the expiration of the time limited for the commencement thereof, and the cause of action survives, it may be commenced by his representative within one year after his death (*Scovill* agt. *Scovill*, 45 Barb. 517).
2. One having a claim against a person deceased, has eighteen months after the death of the latter, during which the running of the statute is suspended; and if personal representatives are appointed, he has in addition, one year from the time of their appointment (*Id.*).
3. Hence, an action upon a promissory note, brought against administrators more than a year after issuing letters of administration, but within six years after the note became due, if eighteen months are excluded in the computation of time, is not barred by the statute of limitations (*Id.*).
4. When a note is made payable on demand, simply, it is to be deemed due at its date, and may be prosecuted immediately, although an actual demand must be made in order to entitle the holder to draw interest upon the principal sum. But where the note is payable on demand, with interest, or with annual interest, the statute of limitations does not begin to run until payment is actually demanded. (*Per Bacon, J.*) (*Id.*)
5. To revive a debt barred by the statute of limitations, where no promise to pay is shown, but one is sought to be implied from an acknowledgment of the indebtedness, the acknowledgment should contain an unqualified and direct admission of a previous subsisting debt, for which the party is liable, and willing to pay; and the recognition must be unaccompanied by any circumstance calculated to repel the presumption of an intent or promise to pay (*Loomis* agt. *Decker*, 1 Daly, 186).
6. When the debtor, in a letter to the creditor said: "I don't recollect when the bill was made, but if it is all right I will make it satisfactory," and added that he had certain railroad bonds which he hoped would be accepted in payment, "as money was out of the question:" *Held*, sufficient to take the case out of the statute (*Id.*).
7. It is the province of the court, sitting as a jury, to find as matter of fact, whether a new promise under the circumstances, might fairly be implied, and a finding by the court in this respect, like the verdict of a jury, must be deemed final (*Id.*).
8. An acknowledgment to be sufficient to take the case out of the statute of limitations, must not only be an admission of the existence of the debt, but in addition thereto, a recognition of a liability to pay, in such a mode as will authorize the inference of a new promise (*The Commercial Mutual Insurance Co.* agt. *Brett*, 44 Barb. 489).
9. The makers of promissory notes, being sued thereon, put in an answer admitting the making of the notes, and claiming that they were premium notes; that a loss had been sustained under the policy; and that the notes should be paid out of the insurance moneys: *Held*, that this was not a sufficient acknowledgment to revive a debt barred by the statute of limitations; there being no admission of present indebtedness, or of any willingness to pay the notes, from which a promise to pay might be inferred. An answer in the cause being a compulsory statement under oath, the occasion when, and the circumstances under which statements in it are made, repel any implication of a promise to pay the demand, from any acknowledgment therein (*Id.*).

SHERIFF'S SALE.

1. A sheriff is liable for all the acts of his deputy, official in their character, in executing process, whether he knew the deputy had the process or not (*Pond* agt. *Leman*, 45 Barb. 152).
2. The levy of an execution, for the purpose of collecting it, by a deputy, is an official, and not a personal act. And for all such acts the sheriff is

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liable for the act of his deputy, though it turns out that the act is not justified by the process (*Id.*).

3. A sheriff is liable for the acts of his deputy in levying upon the goods of persons not parties to the execution, although it does not appear that he in fact directed or ratified the act of the deputy in so levying (*Id.*).
4. Where land has been sold by the sheriff, upon execution, payment by the judgment debtor of the amount of the bid, with the prescribed interest, within the year, puts an end to the sale, and extinguishes entirely the power of the sheriff to convey (*Rankin agt. Arndt*, 44 Barb. 251).
5. The advance of money, by a judgment debtor, for the purpose of having the sheriff's certificate assigned to a third person and thus kept on foot, will not operate as a redemption by him, and render the sheriff's certificate null and void, or take away all power from the sheriff to execute a conveyance valid as against creditors (*Id.*).
6. If the assignee of the sheriff's certificate, after having obtained a deed of the premises from the sheriff, conveys the same to bona fide purchasers without notice, the lien of a mortgage executed by the judgment debtor subsequent to the docketing of the judgment on which the sale was made, and prior to the sale, will be cut off by the sheriff's deed, and the purchasers, from the sheriff's grantee will hold the land, as against a party claiming under the mortgage (*Id.*).

SLANDER.

1. In an action for slander, the defendant will not be permitted to prove a justification, under an answer merely denying the allegations of the complaint and alleging that the words charged to have been uttered and spoken by the defendant concerning the plaintiff were true (*Tilson agt. Clark*, 45 Barb. 178).
2. Where the alleged slander consists in charging the plaintiff with having sworn falsely on a trial, an answer setting up a justification should set forth the evidence, and state what was actually sworn to by the plaintiff. The Code has not altered the rule in this respect; and in pleading a justification now, as under the old system, the facts going to establish it must be stated (*Id.*).

STREET ASSESSMENTS.

1. There is no statute requiring that an assessment for regulating and grading streets, &c., in the city of New York, shall be made only after the completion of the work (*Matter of James W. Beekman*, ante, 16).
2. If the assessment precedes the performance of the work, an estimate of the expense must be first made; but after the work has been completed, and the expense has been paid or incurred, or definitely ascertained, the estimate is superfluous (*Id.*).
3. Where all the work has been contracted for, but a portion of it only has been completed when the assessment is made, an estimate is necessary in order to ascertain the amount to be assessed (*Id.*).
4. It is not necessary that the duties to be performed by the assessors should be named in the ordinance. The law has prescribed the duty which they are to perform (*Id.*).
5. Where the assessors consisted of three members, two of whom were appointed by original ordinance in 1856, and one by the board of commissioners of taxes under the act of 1859, in place of one of the original assessors who had resigned after the assessment list had been reported to the board of revision; and the boards after such resignation, returned the list to the assessors for correction:
6. Held, that it was a legal irregularity for the two original assessors to proceed to correct the assessment, without inviting or requesting the other recently appointed assessor to act with them (*Id.*).
7. The statutory rule, as well as the rule of the common law, applicable before the act of 1859, which authorizes a majority of the board of assessors to be appointed under that act, to make estimates and assessments, requires all the members to meet and consult, although a majority may decide, unless special provision is otherwise made (*Id.*).
8. It may be lawful for two to act, if one neglects or is unable to perform duty as an assessor, but it is illegal to exclude one assessor from acting, intentionally (*Id.*).
9. Where assessors in the city of New York, appointed to assess lands for a local improvement, assess the lots of an owner at more than one-half the value of such lots, as valued by the

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assessors of the ward in which the same are situated, it is a violation of the statute (*Laws* 1840, chap. 326, § 7), and a legal irregularity, and the court is authorized, under the act of 1858 to vacate and set aside such assessment (*Matter of Sewer in Thirty-fourth street, ante, 42*).

10. The objection that the confirmation of the assessment is conclusive as to all questions of regularity not raised prior to the confirmation, cannot be sustained in such a case, as the act of 1858 does not require any such preliminary proceeding to entitle a party aggrieved to the benefit of the statute. The whole provision of the act of 1858 is in reference to relief from assessments after confirmation (*Id*).
11. The act (*Laws* of 1861, p. 702) creating a board of revision and correction of assessment lists—composed of the comptroller, counsel to the corporation and the recorder of the city—seems to require that all three of the members should meet together for the purpose of acting, but it prescribes that a vote of a majority of such board shall decide the question in regard thereto (*Id*).
12. Where a motion is made under the act of 1858 to vacate an assessment for regulating and grading a street in the city of New York, on the ground of collusion and fraud between the street commissioner and the contractor, in awarding the contract to the seeming lowest bidder, when he was in fact nearly the highest bidder: The question is not whether the court are inclined to believe or suspect, or whether it is probable a fraud has been committed or may have been committed, but are the parties proved guilty by the evidence (*Matter of Eighth street, ante, 99*).
13. Where the street commissioner is not shown to have had any concert with the contractor, nor is the contract shown to have been procured by fraud, the assessment under the contract cannot be disturbed on that ground (*Id*).
14. The power of the legislature to pass an act (as they did in this case in 1861) confirming such contract, and authorizing the assessment, and requiring the city to pay the contractor the money due upon the contract may be authorized by some late decisions of the court of appeals, but is very doubtful legislation, as it respects the proper application and effect of the laws of municipal corporations (*Id*).
15. All public streets and highways are for the use of the people of the whole state, whether located in town or country. The interest in such use, or the ownership thereof, is *publici juris*; and the appropriation of such streets to private or corporate use, without authority of law, and the consequent obstruction of them, and impediments to travel occasioned thereby, constitute a nuisance, and justify an injunction. And the people of the state are the appropriate parties to seek and enforce the necessary remedy (*The People agt. The New York and Harlem R. R. Co.* 45 Barb. 73).

SUMMONS.

1. An undertaking given pursuant to section 209 of the Code of Procedure, in an action of claim and delivery of personal property, conditioned for a return of the property, if a return should be adjudged, and for the payment of such sum as should, for any cause be recovered against the plaintiff in the action, is substantially one for the payment of money (*Montegriffo agt. Musti*, 1 Daly, 77).
2. And an action against the sureties in such an undertaking, is an action arising on contract within section 129 of the Code, and a summons for a money demand, in such an action, is proper (*Id*).
3. By appearing and pleading to the merits, the defendants waive all objections to the form of the summons (*Le Sage agt. Great Western R. R. Co.* 1 Daly, 306).
4. The objection that a summons issued from a justice's court is invalid by reason of the omission to affix thereto a U. S. revenue stamp, should be made before the justice on the return day of the summons. It is too late to raise that objection for the first time on appeal. After judgment, such an objection should not be listened to in any court (*Baird agt. Pridmore, ante, 359*).
5. It seems, that it was the intention of the U. S. revenue act, to impose a stamp duty of 50 cents upon all writs, summons, and other original process by which a suit was commenced in any court of record, and also of the same amount upon any writ, process or summons in a justice's court, or other court, not of record, for the recovery of any sum exceeding \$100 (*Id*).

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SUNDAY.

1. The sale of a span of horses on Sunday, is not void at common law (*Balsford* agt. *Every*, 44 Barb. 618).
2. The prohibition in the statute relative to the observance of Sunday, against exposing to sale on that day, any wares, merchandize, &c., is not applicable to a private contract for the sale of a span of horses, made without violating, or tending to violate, the public order and solemnity of the day. Such a contract is not necessarily a public exposure of goods and chattels on Sunday, within the prohibition of the statute. If there is any question of fact on that subject which is proper for the consideration of the jury, the defendaant should ask the court to submit the question to the jury (*Id*).

SUPPLEMENTARY PROCEEDINGS.

1. A receiver appointed in proceedings supplementary to execution, is vested with the property and effects of the judgment debtor from the time of the filing and recording of the order appointing him (*Rogers* agt. *Corning*, 44 Barb. 229).
2. After the title to a promissory note, the property of judgment debtors, has vested in a receiver, by virtue of his appointment, it is not in the power of a county judge, or any other judicial officer or court, to divest him of it by a mere order, made in proceedings to which he is not a party. And parties receiving such note from a third person, to be applied upon a subsequent judgment, under an order made by a county judge, will hold it as the receiver's property, and be accountable to him for all the moneys they have received upon it (*Id*).
8. In order to sustain an action brought by a receiver appointed in supplementary proceedings, the plaintiff is bound to show not only the judgment, but also an execution from a court having the right to issue it; and that the same was delivered to the sheriff of the proper county, and by him returned unsatisfied. Without each and all of these facts being proved, a judge has no jurisdiction to entertain proceedings supplementary to execution, or to appoint a receiver of the defendant's property (*Wegman* agt. *Childs*, 44 Barb. 403).
4. A notice served upon a judgment debtor to appear before a referee to answer in supplementary proceedings,

which omits to state the place at which he is to attend, is *fatally defective* (*Kelty* agt. *Yerby*, ante, 95).

5. A receiver appointed in supplementary proceedings, does not acquire the legal title to the property of the judgment debtor until his appointment as such receiver. His title does not relate back to the time of the service of the restraining order in these proceedings, upon the judgment debtor (*Fillmore* agt. *Horton*, ante, 424).
6. Where a creditor by a *bona fide chattel mortgage*, sells the property of the judgment debtor upon the mortgage, and delivers possession to the purchaser, prior to the appointment of a receiver in supplementary proceedings of the debtor's property, such mortgage sale does not constitute a conversion of the property as against the receiver, for which as such, he can maintain an action (*Id*).
7. It is only when the party has possession or control of the property, that a refusal to deliver, on demand, constitutes evidence of a conversion (*Id*).
8. In an action brought by a receiver in supplementary proceedings, and in pursuance of the order appointing him, to set aside a conveyance of real estate made by the judgment debtor, to a third person, and the defendant succeeds on the trial, the judgment creditors of the debtor, who are not parties to the action, and took no part in its prosecution, are not liable for the costs of the action. (*Following the decision in the case of Wheeler* agt. *Wright*, 28 How. Pr. R. 228.) (*Cutler* agt. *Reilly*, ante, 472.)
9. The law making parties in interest liable for costs, was not intended to apply to actions brought in the name of sheriffs, receivers, clerks, or other officers of the court, although third parties might be interested in the recovery, unless the action was brought at the sole suggestion and urgency of such parties, and virtually conducted by them, and especially so, to a case where the action was brought by direction of the court (*Id*).

TAXES AND ASSESSMENTS.

1. A writ of prohibition against a board of supervisors, commanding them to desist and refrain from any further proceedings in imposing or levying any tax upon the *relators*—a *National bank*, assessed or to be assessed upon their capital paid or to be paid in, will be refused for the reason:

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2. *First*. That it is doubtful whether the board of supervisors have the power to alter the assessment rolls by striking out the name of any person or corporation which may have been placed upon it by the assessors.
 3. *Second*. The writ of prohibition is not a writ of right, and is not granted as a matter of course; but only on showing satisfactory grounds for relief, and it being made to appear that no considerable public inconvenience can arise from the delay. The writ should not issue where there are other remedies perfectly adequate (*People agt. Board of Supervisors of Ulster County, ante, 237*).
 4. All the tax payers in the county are interested in the assessment and collection of the taxes; and the allowance of the writ against the board of supervisors might materially delay the completion of their business, and produce much public inconvenience. The taxes against the relators would have to be entirely abandoned, in a summary manner, with no legal mode of collecting them hereafter (*Id.*).
 5. The exercise of a sound discretion would leave the relators to pursue other legal remedies, if any such they have. If the assessors have exceeded their authority and acted entirely without jurisdiction, as claimed, then they are responsible for the damages which may ensue (*Id.*).
 6. It is competent for the state to tax shares in National Banks, although the capital stock is invested in Government securities. But not a greater rate than upon shares in State Banks (*The City of Utica agt. Churchill, ante, 288, U. S. Court*).
- such message is *estopped* from denying the agreement which he has signed, by alleging that he never read it. It is gross carelessness and negligence not to read such conditions and agreement before signing and delivering the message (*Id.*).
3. A person who signs such a paper must know that he signs it for some purpose, and when he gives it to the company must understand that it is to regulate the rights which it explains (*Id.*).
 4. The peculiar and stringent rules by which common carriers are controlled and regulated can have very little just and proper application to telegraph companies (*This seems to be adverse to the general tenor of the opinion in De Rutte agt. N. Y. Telegraph Co. 30 How. 480*).
 5. Even if a telegraph company is held to be an ordinary common carrier, it has the right to limit its liability by express contract. (*This agrees with De Rutte agt. N. Y. Telegraph Co. supra, and is undoubtedly well settled law. If this doctrine is well settled, it would seem also that it settles the question of the similarity of the rules which govern each carrier.*) (*Id.*)
 6. Where the plaintiffs delivered to the defendant for transmission from Palmyra, N. Y. to the city of New York, a message written under the general printed proposition and agreement of the defendants, directing the purchase of \$700, in gold, without requiring a repetition of the message, and when delivered to the plaintiff's correspondent in New York it read \$7,000, in gold, instead of \$700: *Held*, that the plaintiff could not recover for the loss he sustained (*Id.*).

See STREET ASSESSMENTS.

TELEGRAPH COMPANIES.

1. Where a telegraph company furnishes printed headings for the transmission of messages, containing certain terms and conditions upon which such messages will be sent, and an agreement that the same shall become binding upon both parties when signed by the person sending the message; the person who writes his message under such a heading and signs and delivers it accepts such printed proposition, and it thereupon becomes an agreement binding upon the company only according to its terms and conditions (*Breese agt. The U. S. Telegraph Co. ante, 86*).
2. The person who signs and delivers

7. The defendants, a telegraph company, received from the plaintiffs, at Washington, D. C., a dispatch to be transmitted over its line to the plaintiffs' agents in New York, directing them to sell for plaintiffs their "Southern Michigan before board; buy five Hudson at board." The dispatch, as received by the plaintiffs' agents, directed them to sell their Southern Michigan stock before board, and "buy five hundred at board." The agent sold the plaintiffs' Southern Michigan stock before the board, and, at the board, purchased five hundred shares of the same stock. The plaintiffs, on being apprised by telegraph the same day, of the transaction, sent another dispatch, correcting the error, and repeating the first order. This dispatch being received after the ad-

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journalment of the board of brokers, the agents sold on the street the five hundred shares of Michigan Southern R. R. stock, purchased by them, at a loss of four hundred and seventy-five dollars, and purchased at the lowest price five hundred shares of the Hudson River R. R. stock, which was, for the whole number of shares purchased one thousand three hundred and seventy-five dollars more than the same could have been bought for at the board of brokers that day: *Held*, that the plaintiffs were entitled to recover of the defendants the difference between the price at which the five hundred shares of the Hudson River R. R. stock could have been bought at the board of brokers, and the lowest price for which the same could have been, and was, bought after the adjournment of the board, on the receipt of the corrected dispatch (*Rittenhouse agt. The Independent Line of Telegraph, 1 Daly, 474*).

8. *Held*, also, that as the language used in the dispatch, however indefinite to others, was intelligible to the agents, they were not charged with the duty of making further inquiry before acting upon it: *Held*, also, that defendant having placed it beyond the power of the plaintiffs' agents to make the purchase of the five hundred shares of the Hudson River R. R. stock at the board of brokers, it could not avail itself of the fact that the purchase was made on the street after the adjournment of the board, it not appearing that it was injured by the circumstance (*Id*).

TENDER.

1. A tender of United States treasury notes in payment of a debt, is sufficient. A tender should be made irrespective of any other act. If a receipt or satisfaction piece is asked for, it vitiates the tender (*Roosevelt agt. The Bull's Head Bank, 45 Barb. 579*).
2. A party who makes a tender is bound to keep the money at all times ready for payment when demanded, and when sued, is bound to bring the money into court. If, after tender made, the money tendered is used by the debtor in his business, and mingled with his other money, the tender is not valid (*Id*).
3. Since the decision of the court of appeals in the *Metropolitan Bank agt. Van Dyck* (21 N. Y. R. 400), holding that the act of congress, passed February 25, 1862, making certain treasury notes of the United States a legal

tender in payment of debts between private persons, was constitutional and valid, the existence of the power in congress, to declare such treasury notes a legal tender for the payment of debts, must be assumed, to the full extent of the use made of it by congress (*Kimpton agt. Bronson, 45 Barb. 618*).

TENANTS IN COMMON.

1. In respect to the letting of a single crop on shares, when the shares of the owners in the farm products are uncertain in amount, this makes the parties tenants in common, at least in the productions thus to be grown and shared between them (*Tanner agt. Hills, 44 Barb. 428*).
2. Where one of several tenants in common, enters upon the land and cuts and removes timber, and converts the same to his own use, he is guilty of waste, and is liable to his co-tenants under the statute giving the action of waste by one tenant in common against another (*Ehloell agt. Burnside, 44 Barb. 447*).

TITLE.

1. Where a grantor, at the time of executing a conveyance of land, has no legal title to the land, but has merely an equitable title or interest therein, and he afterwards acquires the legal title, he takes and holds such title in equity, in trust for such prior grantees (*Doyle agt. The Peerless Petroleum Company, 44 Barb. 239*).
2. The title of the consignor to paper shipped to his factors to be sold on commission, does not rest in the factors, unless they have made special advances upon the credit of such shipment; or unless, by an arrangement, they are to have a lien upon all shipments for any general balance of advances previously made (*Beebe agt. Mead & N. Y. R. 587*).

TRESPASS.

1. For a joint trespass, committed by two persons, the party injured has his election to prosecute both in one action, or to sue them separately; and in the latter case, provided he recovers, he has the further election *de melioribus damnis* (*Kasson agt. The People, 44 Barb. 347*).
2. If he elects to sue the wrongdoers separately, and recovers in both actions, and sues out an execution upon

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one of the judgments, upon which the defendant is committed to jail, and then the assignee of both judgments gives a written direction to the sheriff to discharge that defendant from custody, the imprisonment of such defendant, and his discharge therefrom, by the assignee, will operate to discharge not only the judgment upon which such defendant was charged in execution, but also the judgment against the other joint trespasser; and the remedy upon both judgments is gone. In such a case the plaintiff in the judgments is entitled to but one satisfaction for the injury he has sustained by the trespass committed by the defendants in the two judgments; and that he has, by the imprisonment of one of them, and discharging him therefrom (*Id.*).

TRIAL.

1. The finding of a jury on a question of fact, upon which there is conflicting evidence, is conclusive, and cannot, except in extreme cases be reviewed on appeal (*Decker* agt. *Myers*, ante, 872).
2. A party cannot make his own declarations evidence in his own favor, where they are not called for by, or are not in response to anything said by the opposite party (*Id.*).
3. The admission of improper testimony upon a material issue, is not a technical error, and cannot be disregarded, though there may be upon the same question other competent and sufficient evidence. The court cannot say that the jury were not influenced by the illegal testimony (*Id.*).
4. The legal rule or measure of damages for a breach of warranty for property sold, is the difference between the value of the property as it really was, and what its value would have been had it corresponded with the warranty (*Id.*).
5. The question to the witnesses "what is the difference in value?" was improper and inadmissible. In this form it tended to elicit, and required or admitted the opinion of the witnesses upon the rule or measure of damages, and upon the amount of the damages the plaintiff was entitled to recover. A witness cannot thus be put directly in the place of the court and jury (*Id.*).
6. The value of property may be proved by the opinion of witnesses who are well acquainted with the value of similar property: but its difference in value in one condition, and in another, cannot be so shown, being a conclusion of the witness upon a mixed question of law and fact. He may give his opinion of the value of the property in one condition, and its value in another; but he should first state the facts within his knowledge upon which he founds his valuation, to enable the jury to appreciate his estimate, and the jury should be left to draw their own conclusion as to the difference of value (*Id.*).
7. *Nellis* agt. *McCarn* (35 Barb. 115), and *Harpending* agt. *Shoemaker* (37 Barb. 270), as to the admissibility of opinion on the question of damages, are in conflict with the long series of adjudged cases on the subject (*Id.*).
8. The objection to the inquiry in relation to the difference of value, was sufficiently specific to raise the question, whether the opinion of the witnesses was admissible, and it was not necessary to have repeated the objection to the similar inquiry of the witness Allen Miller, it having been interposed to the question to the next previous witness, and overruled by the justice (*Id.*).
9. Where a cause, in which there are different counts or causes of action, is brought to trial, and evidence is given by the plaintiff affecting all the causes of action, at the close of which, the defendant moves for a non-suit as to one of the separate causes of action, the granting such non-suit and continuing the action as to the other causes, is of doubtful propriety (*Meyer* agt. *Goedel*, ante, 456).
10. It leaves all the evidence relating to that branch of the case before the jury; while the defendant, by the non-suit, may suppose the testimony on that subject immaterial, and omitted to contradict or explain it. He, however, has a remedy, by moving the court to strike out the testimony relating to that branch of the case (*Id.*).
11. If the defendant does not take this course, he cannot take a valid exception to the permission of the opposite counsel being allowed to comment on such testimony to the jury; as the evidence was properly taken in the case, and had not been stricken out, the fact of the declaration of the judge that he did not consider this cause of action sustained, did not have the effect to remove the evidence from the case (*Id.*).
12. The refusal of the judge to open the case and admit evidence, after the

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summing up to the jury was through, is no proper ground of *exception*. Neither would the admission of evidence under such circumstances be considered a good ground of *exception*. In both respects it is a matter of *discretion* with the judge (*Id*).

13. It is a matter of discretion for the judge to exclude a question on the ground that it has already been answered in effect; and as such, the exclusion is not reviewable on appeal (*Ballard* agt. *Lockwood*, 1 *Daly*, 158).

14. Where there is only one issue, and the intention of the jury to find for the plaintiff is manifest, the court will, in case of a mistake by them, correct their verdict by making it conform to their finding, and give judgment upon it accordingly (*Wells* agt. *Cox*, 1 *Daly*, 515).

15. Where evidence is ruled out by the court below, the appellate court will not inquire into its relevancy, unless it or its substance appear in the case, but will assume that the decision of the court is correct (*Berry* agt. *Mayhew*, 1 *Daly*, 54).

16. If a party wishes to raise the objection that letters of administration were issued without jurisdiction, and are void, he should do it when the letters are offered in evidence. If he then objects to their reception merely as being incompetent, he cannot afterwards insist that they are void for want of jurisdiction in the surrogate (*Eltheridge* agt. *Ladd*, 44 *Barb.* 69).

17. Assuming that a defendant is privileged from answering a question addressed to him as a witness on the part of the plaintiff, the mere conjecture that his refusal to answer, followed by a decision of the justice that he is not bound to do so, or his refusal followed by a ruling that he is privileged, may have created an impression in the minds of the jury that his testimony, if given, would have tended to make out the plaintiff's case, should not be entertained, as the basis of reversing a judgment which is in all respects apparently free from error (*Murphy* agt. *Tripp*, 44 *Barb.* 189).

18. Where the question to be tried is one of fact, and of intent, depending entirely upon the view which shall be taken of the transaction, as to its real purpose and intent, and there is evidence on both sides, the case should not be withheld from the considera-

tion of the jury (*Abbey* agt. *Deyo*, 44 *Barb.* 374).

19. A motion to dismiss the complaint, on account of a defect of parties defendant, cannot be made at the trial. The objection should be taken either by demurrer or answer (*Tremper* agt. *Conklin*, 44 *Barb.* 456).

20. It is well settled that rulings on a trial which ought not to, or cannot, work an injury to the party excepting, should be disregarded on appeal even if erroneous (*Page* agt. *Ellsworth*, 44 *Barb.* 686).

TROVER AND CONVERSION.

1. Where the holder of two promissory notes purporting to be made by the plaintiff, under the pretext of counting the money which the plaintiff had sent by an agent to pay them, and with knowledge of the fact that the plaintiff did not intend to pay the notes except on their being surrendered, took the money up from the table where it lay, and putting it in his pocket, without the consent of the plaintiff's agent, seized the notes and refused to surrender either: *Held*, that the taking of the money was tortious and wrongful, and that no title to it passed to the defendant (*McNaughton* agt. *Cameron*, 44 *Barb.* 406).

2. *Held*, also, that if the defendant seized the money, against the declared will of the plaintiff, he became a trespasser, and was liable for the value of the same, with interest, in an action for the conversion thereof; notwithstanding the plaintiff was justly indebted to him for the amount of the notes (*Id*).

TRUSTEES.

1. If the purposes of a trust are separable, and some of them must arise within two lives, and there are others which can only become operative after the expiration of the two lives, the former may be sustained, but the latter cannot be. To devise an estate by implication, there must be so strong a probability of such an intention, that the contrary cannot be supposed. Where, by the terms of the will, the supposed devisee by implication is constituted a guardian, &c., and, as such guardian, is to have charge of the estate, the idea of a devise by implication is strongly repelled. If the language of a deed or will is susceptible of two constructions, and, by adopting one construction, it would

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appeal, and by filing exceptions to the report (*Id.*).

9. On appeal also, such an error in the proceeding as admeasuring dower by a referee, instead of the three freeholders, should be disregarded, as not affecting the substantial rights of the defendant (*Id.*).

RELEASE.

1. A seal is not necessary to render a release and discharge of a liability upon a promissory note valid and effectual, if the agreement to release and discharge is upon good and sufficient consideration. If not deemed a technical release, such an arrangement will operate as an accord and satisfaction, and will thus be effectual to protect the parties intended to be discharged, in case of a sufficient consideration to give it support (*The Farmers' Bank of Amsterdam* agt. *Blair*, 44 Barb. 641).

RELIGIOUS CORPORATIONS.

1. When the same persons act in a double capacity, as agents or trustees, they must see to it that their transactions are fair and unexceptionable, as regards the rights of either of the parties they represent. If any motive of personal convenience or interest has been subserved, it will constitute a badge of fraud (*St. James' Church* agt. *The Church of the Redeemer*, ante, 381).
2. Where several persons acting for the church of the Redeemer—the defendants as trustees, presented an application to themselves as trustees of the church of St. James—the plaintiffs, for pecuniary aid; and the same persons acting for the plaintiffs, granted the application, and caused to be conveyed to the defendants, real estate, producing nearly two-thirds of the whole income of the plaintiffs, without the payment of any consideration but for the sole purpose of affording pecuniary assistance gratuitously: *Held*, that the transaction was destitute of honesty (*Id.*).
3. And the order of this court permitting the conveyance, constituted no estoppel in favor of the grantee, who had parted with nothing as the consideration for the deed. The order was not an adjudication between the parties, and had not the effect of *res adjudicata* (*Id.*).

RES ADJUDICATA.

1. Where the affidavit of the defendant in summary proceedings to dispossess for the non-payment of rent, raises two questions, and the jury finds generally for the defendant, both questions are presumptively *res adjudicata*, and in a subsequent proceeding, in which one of such questions arises, it is for the plaintiff to show that it was not passed upon by the jury (*Yonkers and N. Y. Fire Ins. Co.* agt. *Bishop*, 1 Daly, 449).
2. Where, in the summary proceedings, the defendant's affidavit denied his indebtedness on various grounds, including that of eviction by title paramount, and also denied any demand of the rent, and the jury found a general verdict for the defendant: *Held*, in a subsequent action for the same rent, that the verdict was presumptively *res adjudicata* on both points, and that it was for the plaintiff to show that the jury only passed on the question of demand (*Id.*).

SALE OF REAL ESTATE.

1. A purchaser of real estate at a public sale will not be released by the court from his purchase, upon the ground, 1st. That a party who it is alleged has an interest in the property, was not made a party to the proceedings for the sale, where it is offered on the hearing of the application, to furnish a release of all the interest of such party in the premises (*In the matter of Margaret R. Bull*, ante, 69).
2. 2d. That certain heirs at law having, as alleged, an interest in the property under the will of the testator, had not been made parties to the proceedings for the sale, where it appeared from the will that the income of the property was given to M. (a daughter), for life, and after her death without issue, to go to his son J. in fee, and he having died before M., leaving a will disposing of his property to his minor children: *Held*, that these minor children of J., could not be necessary parties to the proceedings for the sale, as they had no interest in the property; J., their father, having no interest therein which he could dispose of by will until the death of M., who was then alive (*Id.*).
3. 3d. That two only of the three executors had executed the conveyance, where it appeared that the three executors named in the will had qualified, but one of them of them soon after—

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wards left the United States, and was removed from the office of executor by the surrogate, but had since returned to the United States, and declined to unite in the conveyance: *Held*, that where a trustee resigns or is discharged from his office, the remaining trustees are vested with the entire estate; and the same rule would seem to apply to the removal of an executor by the surrogate. The power he obtains to execute the trust is given to him not by name but as executor, and when removed as executor his relation to the estate ceases (*Id*).

4. But in this case, the sale of the property was not made by the authority contained in the will, but under and by virtue of the statute—acts of 1864 and 1865. The legislature had power to authorize the sale to be made by any officer of the court, or in such manner as the court should direct; and also had power to direct who should execute the conveyance. This they did when they directed that the conveyance should be executed by the said trustees; and that the notice be served on the *two acting executors by name*; the other executor having been removed, and having ceased to act long before the passage of either act (*Id*).

See STATUTE OF FRAUDS, 1, 2, 3, 4, 5

See CONTRACT, 6, 7, 8, 9, 10.

SALE OF CHATTELS.

1. An agreement was entered into between the plaintiff and defendant, for the sale of a cracker machine by the former to the latter, and there was a delivery and an acceptance of a portion of the machine. That portion of the machine not delivered was taken by the plaintiff to a machine shop, at the request of the defendant, for the purpose of being cleaned, which was to be done at the joint expense of both parties. After the cleaning was completed, it was paid for by the plaintiff and that portion of the machine taken by him and tendered and offered to be delivered to the defendant: *Held*, that there was a valid sale of the machine, and not merely an executory contract for a sale, where something remained to be done on the part of the vendor, before the delivery of the property (*Dunnigan agt. Crummev*, 44 Barb. 528).

2. *Held*, also, that the act of taking the machine, by the plaintiff, being for the benefit of the defendant, and his

act, it was a delivery to the plaintiff as his agent, and the latter merely occupied the position of an agent, in conveying the property to the machine shop and returning it to the defendant, and the same was not held at his risk: *Held, further*, that a portion of the machine having been actually delivered to the defendant, and the balance being in the hands of the plaintiff for the benefit and at the request of the defendant, and under the control and subject to the order of the latter, this was a sufficient delivery of the property (*Id*).

3. It is a general principle that when goods are ordered to be sent by a carrier, a delivery to the carrier operates as a delivery to the purchaser, in whom the title immediately vests, subject to the vendor's right of stoppage in transitu; and the goods, in the course of transit, are at the risk of the purchaser. But where it is apparent, from the circumstances under which the delivery was made, that the vendor did not trust to the ability or readiness of the purchaser to perform his contract, and intended to insist upon strict prepayment as a condition of delivery by the carrier: *Held*, that such delivery by the vendor to the carrier, is not within the general rule, and does not operate to pass title (*Baker agt. Bourcicault*, 1 Daly, 23)

4. A tender by the vendor, of an indorsed custom house permit, authorizing a delivery of the goods by the warehouse man, it appearing that the permit was sufficient if indorsed by the vendor, to enable the vendee to take possession: *Held*, a sufficient offer of delivery of the goods. The want of the indorsement was immaterial, as the indorsement could have been made immediately, had the vendee made objection on that ground (*Dunbar agt. Pettce*, 1 Daly, 112).

5. Where it appears from the course of dealing of the warehouse man, or by the agreement of the parties, that the goods stored will be delivered without requiring immediate payment of the storage, the warehouse man relying upon the personal credit of the party, there is no lien; because such a course of dealing is inconsistent with an implied agreement at the time of the deposit, that the property is not to be taken away unless the storage is paid (*Id*).

6. There being no lien upon the property for storage, and the vendee on the permit already tendered having the right to the possession of the property, it would be unreasonable to require

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of chattels; and any assertion of the vendor, concerning the article sold, if it be relied upon by the vendee, and understood by both parties as an absolute assertion, and not merely an expression of opinion, will amount to a warranty (*Wilbur* agt. *Cartright*, 44 Barb. 563).

6. The maxim of *caveat emptor* only applies when both parties are assumed to be equally ignorant of defects, and the purchaser sustains the loss on account of his negligence in omitting to exact a warranty. The principle is that the purchaser has it in his power to guard against a latent defect or deception in the article purchased, by exacting a warranty from the vendor; but if, instead of taking this precaution, he trusts to his sagacity and judgment, he should bear the loss (*Id*).

7. When a bargain is fairly made and concluded and its terms clearly understood, the rule of *caveat emptor* ceases, and both parties, thereafter, are bound to exercise good faith in carrying out the contract and executing its provisions (*Botsford* agt. *McLean*, 45 Barb. 478).

8. A party receiving a conveyance under and in execution of an agreement between others, which is in equity for the benefit of third parties, with notice, or charged with the duty of inquiry, must be held to take subject to all the rights of such third parties, or their creditors (*Cowing* agt. *Greene*, 45 Barb. 585).

After the last installment upon an agreement for the sale of land has become due, the payment of the unpaid purchase money, and the conveyance of the land, become dependent acts and the vendor cannot recover the amount remaining due without showing performance, or an offer to perform, on his part. If he is unable to give a good title to the lands agreed to be conveyed, he is not entitled to recover the unpaid purchase money (*Smith* agt. *McCluskey*, 45 Barb. 610).

10. Whatever may be the rule in regard to the duty of a purchaser of goods to examine for himself, where no questions are asked by him and nothing said or done by the vendor to mislead or deceive, it is clear that the purchaser has the right to trust to the declarations of the vendor as to the condition of the thing purchased, and may omit to make any examination, without losing his right to maintain an action for fraud, in case fraud is prac-

tised by the vendor (*Willard* agt. *Merritt*, 45 Barb. 295).

11. Where there is fraud in a contract for the purchase of goods, but they are freely and voluntarily delivered, the title passes to the vendee. Otherwise if the possession is acquired by felony, tort or fraud. And when the possession is obtained by delivery with intent to pass the property, the vendor may nevertheless rescind the contract and follow and reclaim the goods, so long as he can identify them, until they have been transferred to a *bona fide* purchaser (*Lacker* agt. *Rhoades*, 45 Barb. 499).

12. Where by the terms of a contract of sale of real estate, a day is fixed for the payment of money by the vendee, and the delivery of a deed by the vendor, the vendor is bound to seek the vendee and tender the deed, or by some act call upon him to perform his contract, before he can place the vendee in such a position as will work a forfeiture of a sum paid on account of the purchase price. The fact that the vendee quits the premises before the day agreed upon for the delivery of the deed, does not absolve the vendor from his obligation to tender a deed, if he wishes to put an end to the contract (*Thomas* agt. *Wichman*, 1 Daly, 58).

13. And the vendee having subsequently made a tender of performance of his part of the contract may, on refusal of the vendor to deliver a deed, recover a sum paid under the contract. A declaration by the vendee's attorney, made prior to the day on which the title was to be passed, that the vendee did not want the title: *Held*, no evidence that the vendee did not intend to complete the contract on the day specified in the contract; and would not excuse the vendor's default to perform or tender a performance on his part (*Id*).

See CONTRACT. See SALE.

WAREHOUSEMAN.

1. A warehouseman who takes goods upon storage for hire, is answerable for their loss, or the loss of any part of them, not proceeding from the inherent nature of the goods, such as absorption, deterioration, or like cause, unless he can show that the loss occurred under circumstances exonerating him from all blame; or if he cannot do that, that he exercised a degree of care in their safe keeping, that would repel any suspicion of the

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loss having occurred through his negligence or dishonesty (*Armit agt. Spivey*, 1 *Daly*, 347).

WILLS.

1. It seems that a devise of real estate universal in its terms, would carry after acquired lands, without any language pointing to the period of the testator's death. But in the absence of unlimited terms in the will, there must be language which will enable the court to see that the testator intended to operate upon real estate which he should afterwards purchase (*Lynds agt. Townsend*, 33 *N. Y. R.* 525).

2. If the purposes of a trust are separable, and some of them must arise within two lives, and there are others which can only become operative after the expiration of the two lives, the former may be sustained, but the latter cannot be (*Post agt. Evers*, 33 *N. Y. R.* 593).

3. It seems, that on questions of testamentary capacity, courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienation. The true test of insanity affecting testamentary capacity, &c., aside from cases of dementia or loss of mind and intellect, is mental delusion. A person, persistently believing supposed facts, which have no real existence, against all evidence and probability and conducting himself upon the assumption of their existence, in so far as such facts are concerned, under an insane delusion (*Shuman's Friend Society agt. Hopper*, 33 *N. Y. R.* 610).

4. The costs of the appeal may be charged upon the proponent of an alleged testamentary paper, where the court are of opinion that he has conducted himself improperly in the premises (*Id.*).

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6. The testator by his will, directed his executor, at the expiration of four

years after his decease, to invest out of his estate, upon safe and sufficient real estate securities, at the legal rate of interest, the sum of \$3,000, and to keep the same invested for the benefit of his granddaughter, Rachel S. Lansing, until she shall attain the age of twenty-one years, or until her death, applying the interest that might be received from said investment, or so much thereof as might be necessary toward the support and education of said Rachel, and when she shall attain the age of twenty-one years, his executor is to pay her the sum of \$3,000, with the accrued and accumulated interest, except so far as the use thereof has been necessary as aforesaid, and by said executor deemed proper for the education and support of said Rachel; and subject to the like necessity, his executor is directed to reinvest safely and securely, the interest he may receive during such investment, for the like benefit of said Rachel. After some other bequests, the residue and remainder of the estate is disposed of, subject to the previous payment of the legacies and investments by the executor:

7. *Held*, 1st. On a final accounting of the executor before a surrogate, that the fund in the hands of the executor for the benefit of Rachel S. Lansing, was held by him in his character as an executor, and not as trustee, and he was entitled to a commission of one per cent upon the interest or increase of the fund, instead of five per cent, as erroneously allowed by the surrogate:

8. *Held*, 2d. That this fund being set apart, and the income given without any particular amount being specified, was chargeable with the commission and taxes—they were not payable out of the general estate:

9. *Held*, 3d. That although the executor personally worked out the highway taxes, they were nevertheless properly chargeable upon the fund:

10. *Held*, 4th. That the surrogate properly excused the executor from any personal liability in not keeping the interest upon the interest reinvested fully, where he stated in his account filed "that he had tried to keep the fund together, with the accrued and accumulated interest, invested and reinvested, as required by the will, and that he had not been able to do any better than is stated in the account;" it not being claimed that the executor used the funds in his own business, in trade, or that he made any particular profit from their use,

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nor was there any thing to establish that he was guilty of any gross delinquency or violation of duty:

11. *Held, 56A.* That the executor was excused in depositing the funds in a savings bank, at an interest of five per cent semi-annually, where they had been paid into his hands upon a bond and mortgage upon real estate, which had become due, where he showed that it was very difficult at that time to loan money on good real estate securities; and especially as he put it in an institution where the rate of interest was quite as large as it would have been if deposited in the New York Life and Trust Company, where such investments are sanctioned by the courts:

12. *Held, 56A.* That the surrogate erred in directing the payment of the sum due to the plaintiff, with interest at five per cent. There was no good reason why the amount should not draw interest at the usual legal rate from the time of the decree (*Lanning* agt. *Lanning*, ante, 55).

13. The testator gave two-thirds of his personal, in trust, to thereof to his sister her life, and upon her two-thirds to be paid T. G., coupled with declaration: "It be by this, my will, that annuities shall come and payable, that the remainder of the same and belong to my wife to the exclusion of and relations." His brother T. G., having been the principal creditor of the estate) *in part* distributable among the testator's next of kin—under the statute of distributions, as in cases of intestacy as a vested estate. The payment thereof, was, however, postponed until the death of the sister, S. W. A., who was to receive the income of the whole during her natural life. And S. W. A., became entitled absolutely to her equal proportion (one-third) of the said principal fund as heir at law, which at her death passed under her will (*Anthony* agt. *Brouner*, ante, 1981).

14. An appeal from a surrogate's decree of distribution must be taken in three months therefrom, although it does not make a final distribution of the whole estate (*Id.*).

15. Where there is no provision in a will

specifying a time when a legacy shall be paid, it is payable one year from the time of granting letters testamentary or administration (*Compost* agt. *Obedy*, ante, 173).

16. But the legatee in such case, has a right to the interest on the legacy after one year from the death of the testator or intestate. The old rule in equity is still in force governing the payment of interest in such cases (*Id.*).

See *Saxa*, 1, 2, 3, 4.

WITNESSES.

1. The provisions of the Code of Procedure, making a party a witness in his own behalf, do not apply to parties to criminal prosecutions. Those provisions apply only to civil actions (*Williams* agt. *The People*, 33 N. Y. R. 595).

2. The effect of the amendment of section 399 of the Code of Procedure, passed in 1865, which provides that "a party to any action or special proceeding in any and all courts and before any and all officers acting judicially, may be examined as a witness on his own behalf," and of the concluding clause thereof, declaring that "nothing contained in section eight of this act, shall be held or construed to affect or restrain the operation of this section," was merely to remove all restrictions applicable to the civil courts. The amendment does not embrace parties to indictments and criminal cases. Hence, on the trial of an indictment for a criminal offense, the prisoner cannot be examined as a witness in his own behalf (*Williams* agt. *The People*, 45 Barb. 197).

3. On the 24th of December, 1855, the defendants made their promissory note for \$300 payable to Jacob Collier, senior, one year after date, for money lent and advanced. On the 1st of April, 1859, the payee sold and transferred the note to John Collier. The latter died in June, 1863, leaving a will, by which he appointed Jacob Collier, 2d, his executor, who as such executor, after the death of the payee, brought an action against the makers, upon the note. The defendants set up the defense of usury: *Held*, that one of the defendants was properly admitted as a witness in behalf of himself and his co-defendant, to establish the defense, by proving conversations and transactions between himself and the payee of the note at

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the time it was given (*Coller* agt. *Wenner*, 45 Barb. 397).

4. The plaintiff, in a suit in equity brought to establish a lost or destroyed will, against the administrator, and next of kin of the testator, is not a competent witness in his own behalf, to prove conversations had between himself and the deceased, at the time of making the will and before, on the subject of the will (*Timon* agt. *Claffy*, 45 Barb. 438).
5. In an action brought by a judgment creditor, to reach and apply on his judgment, moneys and property of the judgment debtors alleged to be in the hands of their attorney and another person, and to be by them fraudulently withheld from the judgment debtors and their creditors, one of the judgment debtors is not disqualified as a witness, on the ground that the action is prosecuted for his immediate benefit; the benefit to him, in case of a recovery, being *mediate*, that is, through the medium of another—the receiver—and by indirection, in the payment of his debts; not *immediate*, by putting into his hands or power the very proceeds of the recovery (*Corn-ing* agt. *Greene*, 45 Barb. 585).
6. Where the complaint was not given in evidence, and the plaintiff was not asked any questions in relation to its contents: *Held*, that the judge properly refused to charge the jury that the discrepancy between the plaintiff's sworn complaint, and his evidence and the testimony, might be taken into consideration in considering his credibility (*Fash* agt. *Third Ave. R. R. Co.* 1 Daly, 148).
7. Husband and wife cannot be examined either for or against each other except in cases where they are parties to the suit (*Rogers* agt. *Rogers*, 1 Daly, 194).
8. The question, to a witness, for the purpose of impeaching his credibility, whether he had not been expelled from an Odd Fellows' lodge: *Held*, properly excluded, as an affirmative answer would not affect the credibility of the witness (*Greaton* agt. *Smith*, 1 Daly, 380).
9. An offer to show that the witness had been convicted and imprisoned for gross intoxication on a certain day:

Held, properly excluded, as it was an effort to impeach a witness by proof of a particular offense. The cross-examination of a witness, as to a conversation had by him, must be limited to that particular subject of the conversation which was brought out on the direct examination. The whole conversation cannot be given on the cross-examination (*Id.*).

See EVIDENCE, 5, 6, 7, 8, 9, 10, 12, 12.

WRIT OF PROHIBITION.

1. A writ of prohibition against a board of supervisors, commanding them to desist and refrain from any further proceedings in imposing or levying any tax upon the relators—a national bank—assessed or to be assessed upon their capital paid or to be paid in, will be refused for the reason: *First*. That it is doubtful whether the board of supervisors have the power to alter the assessment rolls by striking out the name of any person or corporation which may have been placed upon it by the assessors. *Second*. The writ of prohibition is not a writ of right, and is not granted as a matter of course; but only on showing satisfactory grounds for relief, and it being made to appear that no considerable public inconvenience can arise from the delay. The writ should not issue where there are other remedies perfectly adequate (*People* agt. *The Board of Supervisors of Ulster County*, ante, 237).
2. All the tax payers in the county are interested in the assessment and collection of the taxes: and the allowance of the writ against the board of supervisors, might materially delay the completion of their business, and produce much public inconvenience. The taxes against the relators would have to be entirely abandoned, in a summary manner, with no legal mode of collecting them hereafter (*Id.*).
3. The exercise of a sound discretion, would leave the relators to pursue other legal remedies, if any such they have. If the assessors have exceeded their authority, and acted entirely without jurisdiction, as claimed, then they are responsible for the damages which may ensue (*Id.*).

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COURT OF APPEALS.

DECISIONS RENDERED JUNE, 1866.

Judgment affirmed, with costs.

The People, &c., resp't agt. The Third Avenue R. R. Co., app'ts (30 *How.* 121).
Wm. F. Bascom et al., appellants agt. Caroline B. Nichols et al., respondents.
Henry Van Guysling and ano., app'ts agt. James Van Kuren et al., respondents.
George F. Cookingham, resp't agt. Hannah Lasher, admx., &c., app'ts (37 *Barb.* 656).

Elizabeth Mackay, admx., resp't agt. The N. Y. Central R. R. Co. appellant.
James McGregor, exr., &c., resp't agt. Duncan McGregor et al., appellant.
Moses G. L'Amoreaux, respondent agt. Michael O'Bourke and ano. appellant.
Abram G. Thompson admr., respondent agt. John Bennett, appellant.
Ezra Spaulding and ano., app'ts agt. David Hallenbeck and ano., resp'ts (30 *Barb.* 292; 38 *Barb.* 78).

John Chadwick, collector, &c., respondent agt. Moses O. Crapsey, appellant.
Everett W. Loveridge, appellant agt. Robert Oyer, respondent.
James D. Foster, supt., &c., app't agt. George Cronkhite et al., supt. &c., resp'ts
John Wilmott et al., app'ts agt. Thomas Richardson et al., resp'ts (7 *Bosw.* 570).
Peter Boehm et al., resp'ts agt. The Williamsburgh City Fire Ins. Co., app'ts.
Dewitt C. Thomas, late sheriff, &c., resp't agt. Chester Hubbell, et al., app'ts.
Eliakim Reed, respondent agt. Bushrod W. Farr, appellant.
Maria A. Wolfe, respondent agt. Gustavus Adolphus Scroggs, appellant.
Charles Willis, respondent agt. The Long Island R. R. Co., appellant. (32 *Barb.* 398).

Stephen Duffy, respondent agt. Fleming Duncan et al., appellants.
Wm. Hoge et al., respondent agt. Killian V. R. Lansing, appellant (two causes).
Michah White, respondent agt. Alex. Cadder, appellant.
Jesse C. Easton, respondent agt. Charles S. Clark, appellant.
The Belmont Branch of the State Bank of Ohio at Bridgeport, appellant agt.
William Hoge et al., respondents (7 *Bosw.* 543).
William Williams, respondent agt. William O. Brown, appellant.

Judgment reversed and new trial ordered, costs to abide the event.

Daniel H. Fitzhugh et al., appellants agt. Wm. H. Sackett, imp'd, &c., resp't.
Henry Millard, respondent agt. Edward Brown, appellant.
Martha Ernst, ex'x, &c., appellant agt. The Hudson River R. R. Co., respondent
(19 *How.* 205; 24 *How.* 97; 32 *Barb.* 159).
John Bissiegel, appellant agt. The New York Central R. R. Co., respondent (31
How. 181; 33 *Barb.* 429).
George H. Renand et al., app'ts agt. Michael O'Brien et al., resp'ts (25 *How.* 67).
Thomas J. Van Sant, appellant agt. James H. Pullis and wife, respondents.
Edward V. Haughtwout et al., resp'ts agt. The Mayor, &c. of New York, appts.

Decisions Court Appeals.

Order for new trial reversed, and judgment on report of referee affirmed, with costs.
George G. Freer et al., ex rs, &c., appellants agt. Abram Stotenbur, respondent (36 Barb. 641).

Judgment affirmed, with costs, and ten per cent damages:

Henry Johnson, respondent agt. Henry H. Hathorn, ex'r, &c. appellant,

Judgment reversed as to appellant, and judgment declaring the priority of the title of Richard O'Connell over the mortgage of the plaintiff, with costs.

Mayor Stern, respondent agt. Mary Matilda O'Connell, adm'r, &c., appellant.

Order granting new trial affirmed, and judgment absolute for defendants. with costs.

Alexander Annett, admr., &c., app't agt, Charles M. Terry, imp'd, respondent (27 How. 824).

Judgment affirmed with costs and motion to dismiss appeal from two orders granted, with costs.

Albert Cotes et al., ex'rs. &c. resp'ts agt. Andrew R. Smith et al., app'ts (29 How. 826 : 31 How. 146).

Judgment of supreme court and county court reversed and judgment of the justice affirmed, with costs.

Albert J. Rockwell and others, ex'rs, &c., app'ts agt. William B. Nearing, resp't.

Orders reversed and proceedings dismissed, with costs.

Harriet M. Locke, adm'r, &c., resp't agt. Truman G. Mabbett, et al., appellants.

Order granting new trial reversed and judgment on verdict affirmed, with costs.

Sylvanus Merritt, app't agt. Isaac Carpenter et al., resp't (30 Barb. 61.

Frederick N. Laurence et al., assignees, &c.. app'ts agt. The Bank of the Republic, respondent (31 How. 502).

Judgment reversed and judgment of special term affirmed, with costs.

Arthur Constant Du Bois, Baron De Courval, and Mary, his wife, respondents agt.

Mary Rebecca Ray. resp't, and Robert Ray et al., app'ts (7 Bosw. 244).

Judgment of Supreme Court reversed and judgment of County Court affirmed, with costs.

The Board of Commissioners of Excise of Delaware County, respondent agt. Daniel W. Sackrider, appellant.

Orders in each case granting new trials affirmed, and judgment absolute therein for plaintiffs, and the Supreme Court is directed to ascertain the plaintiffs' damages, and render judgment therefor, with costs.

Amos Robins and ano., resp'ts agt. Stephen D. Dillaye et al., app'ts (two cases). 33 Barb. 77.)

Judgment reversed and judgment on verdict affirmed, with costs.

The Fire Department of the City of New York, app't agt. Daniel Buhler, resp't (1 Daly, 391).

Judgment reversed, and judgment for defendant, with costs.

William Peel, resp't agt. The Board of Metropolitan Police et al., app'ts (44 Barb. 91).

Order appealed from affirmed, with costs.

William S. Rogers and wife, resp't agt. John McLean et al., app'ts (31 How. 279; 31 Barb. 304; 11 Abb. 440).

Decisions Court Appeals.

SEPTEMBER TERM, 1866.

Reargument ordered.

The People, &c., respondents agt. Benjamin Brandreth et al., appellants.
Eliza A. Vrooman, respondent agt. Eliphalet Kink, appellant.
Charles Kelsey, appellant agt. Gamaliel King et al., respondents. (32 Barb. 410;
11 Abb. 180.)

Judgments affirmed with costs.

Conrad Poppenhausen, appellant agt. Ebenezer Seeley, executor, &c., respondent (44 Barb. 450).
John Fitch, app'lt agt. Ransom Gardinier et al., respondents.
Horace Prior and another, ex'r, &c., resp't agt. Gibson T. Williams et al., app'lts.
William B. Chamberlain, app'lt agt. Horace Prior et al., ex'rs, &c., resp'ts.
Benoni Lee, ex'r, &c., resp't agt. Demetrius M. Chadsey and another app'lts.
George S. Tuckerman, rec'r, &c., resp't agt. Hamilton A. Brown, app'lt (11 Abb. 889).
George S. Tuckerman, receiver, &c., respondent agt. Morgan L. Brown, appellant (11 Abb. 889).
The Weedsport Bank, appellant agt. The Park Bank respondent.
Calvin Hotchkiss et al., resp'ts agt. The Artisans' Bank, app'lts (42 Barb. 517).
Geo. M. Griggs et al., resp't agt. Otis B. Howe et al., app'lt (31 Barb. 100).
James Meyers, app'lt agt. James L. Burns, resp't (33 Barb. 401).
James H. Heroy, et al., resp't agt. John Kerr, app'lt. (21 How. 409 ; 8 Bosw. 194.)
Andrew Passenger, resp't agt. William Thorburn, app'lt (35 Barb. 17).
Malcolm Campbell, rec'r, &c., app'lt agt. Mary E. Fowler et al., resp't.
The Mechanics' Banking Association, resp't agt. The New York and Saugerties White Lead Co. app'lt. (20 How. 509 ; 23 How. 74.)
Eveline Ostrander et al., ex'r, &c., resp't agt. Lewis D. Fay, app'lt.
John Mosher et al., resp't agt. Leman B. Hotchkiss, app'lt.
Charles Kelsey, app'lt agt. Wm. L. Rowan, resp't.
George C. Wolsey, resp't agt. Trustees of the Village of Rondout, app'lt.
Henry H. Morange, resp't agt. Peter Morris, app'lt. (20 How. 257 ; 26 How. 247 ; 32 Barb. 650 ; 34 Barb. 311 ; 12 Abb. 164 ; 17 Abb. 86.)
James T. Main, resp't agt. Asa C. Davis and another, app'lts (32 Barb. 461).
James T. Main, resp't agt. William R. Jones, app'lt.
Wallace Johnson, resp't agt. Henry Morrell, impl'd, &c., app'lt (42 Barb. 623).
William Strand, resp't agt. David Tilton, app'lt.
Morgan Kerr, app'lt agt. Willam Hays, respondent.
John Monroe et al., resp'ts agt. Leon Guillaume, appellant.
Joel N. Hays et al., app'lts agt. John S. Heyer et al., resp'ts.
James Ryan, app'lt agt. The N. Y. Central R. R. Co., respondent.
William Hamilton, resp't agt. Enos Gaynard, app'lt (34 Barb. 204).
Barzillai Slosson, resp't agt. William D. White, appellant.
James H. Van Allen, resp't agt. The Ill. Cent. R. R. Co., app'lt (7 Bosw. 515).
The People ex rel. Van Rensselaer et al., app'lts agt. James Van Alstyne et al., resp'ts (32 Barb. 131).
Bernhard Baltes, resp't agt. Adolph Ripp et al., app'lts.
Amos Bronson, rec'r, &c., resp't agt. Daniel M. Tuthill et al., app'lts.
Susan A. Brooks, resp't agt. Oliver Van Every, app'lt.
Charles H. Mills, resp't agt. Cornelius K. Garrison, app'lt.
Lewis F. Therasson et al., app'lts agt. George F. Peterson et al., respondents.
Jeremiah Day, respondent agt. Seth H. Field, late sheriff, appellant.

Decisions Court Appeals.

James Bunten, resp't agt. Oriental Insurance Co., app'lt (8 Bosw. 448).

Lawrence Burke, resp't agt. Theodore P. Nichols, app'lt. (21 How. 459 ; 34 Barb. 430.)

James Bloomer, plaintiff in error agt. The People, &c., defendants in error,

Eugene Hollywood, plaintiff in error agt. The People, defendants in error.

Isaac Brower, respondent agt. Uri Scofield, appellant.

The People ex rel. John Bodine, app'lts agt. Com'rs of Taxes, &c., of N. Y., resp'ts.

The same ex rel. Henry J. Beers agt. The same.

The same ex rel. Francis A. Palmer agt. The same.

The same ex rel. Ralph Mead agt. The same.

The same ex rel. John E. Williams agt. The same.

The same ex rel. David Dows agt. The same.

The same ex rel. R. L. Kennedy agt. The same.

The same ex rel. Denning Duer agt. The same.

The same ex rel. Abiel A Low agt. The same.

The same ex rel. Peter M. Bryson agt. The same.

The same ex rel. William K. Kitchen agt. The same.

Judgment reversed and new trial ordered, costs to abide the event.

Mary Mahler, exe'x, &c., app'lt agt. The Norwich and New York Transportation Co (30 How. 237).

Henry Erben, resp't agt. Peter Lorillard, app'lt.

William L. Rowan, resp't agt. Charles Kelsey et al., app'lts.

Ann Haviland, resp't agt. David P. Halstead, app'lt.

Chauncey Barnard, app'lt agt. John B. Monnott, respondent.

August Roelker et al., app'lts agt. The Great Western Insurance Co. respondent (8 Bosw. 222).

George J. Byrd et al., app'lts agt. Alvan Hall, resp't.

Cynthia A. Sheldon and another, resp'ts agt. Henry Edwards.

Judgment affirmed with costs, and costs of both parties to be paid out of the funds of the estate.

Mara O'Hara, app'lt agt. Cornelius Dever, ex'r, et al., resp'ts (30 How. 278).

Order granting new trial reversed, and judgment on report of referee affirmed, with costs.

Theodore Smith, app'lt agt. William Sweeney, resp't.

Ezra R. Hall, app'lt agt. John S. Sampson, resp't. (19 How. 481 ; 23 How. 84).

Judgment affirmed with costs, and ten per cent damages.

Henry Nourry, resp't agt. Samuel Lord, app'lt.

Judgment affirmed with costs, with leave to plaintiff to amend upon payment to the defendant of the costs of the demurrer awarded at Special Term, and the costs of the appeal to the General Term of the Supreme Court, and of the appeal to this court in twenty days after their adjustment.

Andrew Thatcher, survivor, &c., app'lt agt. William Candee, respondent.

Judgment reversed, and judgment for plaintiffs on demurrer with costs, with leave to the defendants to answer on the payment of the costs of the appeal to this court, and the costs of the Special and General Terms of the Supreme Court, in twenty days after their adjustment.

Phebe Case et al., app'lts agt. John M. Carroll, respondent.

Appeal dismissed with costs.

The New York and New Haven Railroad Company, resp'ts agt. Robert Schuyler,

Decisions Court Appeals.

Edgar Ketchum and others, appl'ts. (16 How. 484; 28 How. 187; 29 How. 89; 38 Barb. 594; 8 Abb. 289.)

Orders appealed from in each of the four appeals reversed, with costs to be paid by the respondent, order made at special term, October 4, 1864, discontinuing all proceedings herein affirmed, and motion to dismiss appeal denied, with ten dollars costs.

In re. application of Mortimer Livingston and another, for the removal of Birdsell, trustee, &c., under trust deed of William Winter. (Four appeals.)

Judgment of Supreme and County Courts reversed, and judgment of justice affirmed with costs.

Andrew Burhyte, resp't agt. Alfred Vose and another, app'lt.

Order granting new trial affirmed, and judgment absolute for defendant with costs.

James J. Baldwin, app'lt agt. The City of Buffalo, resp't (29 Barb. 396).

Order affirmed with costs.

Jane F. Baldwin, exe'x, &c., app'lt agt. The Mayor of N. Y., resp't (15 Abb. 115).

Judgment of the General Term and of Special Term reversed, and all the provisions of the will are adjudged valid, except that the provisions in the seventh and eighth items, restricting the division, sale, alienation and conveyance of the real estate, are adjudged void for repugnancy; and the direction in the seventh item respecting accumulation is inoperative, and that portion of the judgment of the General Term which modifies the judgment of the Special Term, and declares the second item of the will valid, is not appealed from, and therefore stands. The executors to retain their own costs of the litigation to be taxed, and to pay the taxed costs of the other litigants in the suit, the plaintiffs included, and out of the residue of the estate remaining in the hands of the executors, after paying the specific legacies, or setting apart sufficient to pay them, and the record is remitted to the Supreme Court, with directions to enter judgment accordingly.

Matilda Oxley, resp't agt. Hiram O. Lane et al. app'lt.



AMENDMENT TO RULE IX, ADOPTED OCTOBER 6TH, 1866.—Rule IX is hereby amended so as to require the delivery to the Clerk upon the argument or submission of every cause, of eight copies of Cases and Points, instead of six copies as now provided.

AMENDMENT TO RULE XX, ADOPTED OCTOBER 6TH, 1866.—Rule XX is hereby amended by striking out the word "ten" therein where it occurs, and by inserting in lieu thereof the word "fifteen," so that hereafter fifteen causes shall be placed on the day Calendar.

P. H. JONES.

Ox. A. A. P.



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